

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From January 1, 1942
Through March 31, 1942
Volume XXVI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1942, through March 31, 1942.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

January 2, 1942

Hon. Jeff D. Smith,
Circuit Solicitor,
Madison County,
Huntsville, Alabama.

Intoxicating Liquors—Near Beer—

The Statute which authorized the manufacture and sale of near beer (cereal beverages, in which hops, malt, or other light ingredients are used, containing not more than one-half of one per cent alcohol) in Alabama was omitted from the Code of Alabama, 1940, and is, therefore repealed.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of December 12, 1941, is as follows:

"I am seeking your opinion in regard to the following facts: Act of 1932, General, at page 56, is the near beer statute permitting and legalizing near beer in Alabama.

"I have the 1940 Code, recently adopted, but have been unable to find the near beer statute, and I am inclined to believe that the Code Committee omitted the same. It is my understanding that, since the near beer statute was omitted by the 1940 Code Committee and the Code having been adopted and approved, the near beer statute is no longer in force and effect in Alabama. I would appreciate your opinion as to this.

"Our county having recently gone dry, I will naturally have to have a ruling on this phase of presenting evidence that beer contains more than one-half of one per cent alcohol."

The statute which authorized the manufacture and sale of near beer in Alabama (cereal beverages, in which hops, malt, or other light ingredients are used, containing not more than one-half of one per cent alcohol) was Act No. 54, H. 71, which became a law under Section 125 of the Constitution on October 6, 1932, (General Acts, 1932, page 56). This statute was omitted in its entirety from the Code of Alabama, 1940, probably because the codifiers felt that it had been superseded by the provisions of the Alabama Beverage Control Act (Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 General Acts, 1936-37, page 40, which is codified as Code of Alabama, 1940, Title 29, Chapter 1, Sections 1-78).

Act No. 89, H. 72, approved October 15, 1932, (General Acts, 1932, page 94), was a companion Act to Act No. 54, supra, and providing for the licensing of those persons, firms, companies, corporations, wholesalers, jobbers and distributors who handled near beer in any of the manners therein described. It

likewise was omitted from the Code of Alabama, 1940, Title 51, Section 476, levies a license on all machines or apparatus used by a person, producing, bottling or distributing near beer in bottles, in filling or bottling the same, as well as on machines or apparatus used by such persons in filling or bottling soda water, etc. However, this does not make the manufacture or sale of near beer legal. See *Casmus v. Lee*, 236 Ala. 396, 183 So. 185. Another companion statute to Act No. 54, supra, was Act No. 112, H. 73, approved October 22, 1932, (General Acts, 1932, page 112), which provided for the appropriation of the monies derived from the licenses levied by Act No. 89, supra. This statute was superseded by Act No. 519, H. 512, approved September 21, 1939, (General Acts, 1939, page 808), and was likewise omitted from the Code of Alabama, 1940.

Act. No. 628, H. 917, approved July 2, 1940, (General Acts, 1939, page 995) is the act adopting the code of laws for the State of Alabama, and Section 2 thereof provides as follows:

"Section 2. The Code of Alabama as herein adopted shall go into effect and be operative on the thirtieth day after the date of the Governor's proclamation announcing its publication, and shall govern completely, so far as a statute can, the subjects to which it relates; provided, however, that no statute enacted on or after the 25th day of June, 1940, shall be repealed or affected in any manner by the adoption of this Code."

This Code, known as the Code of Alabama, 1940, became effective on May 31, 1941, the thirtieth day after the date of the Governor's proclamation announcing its publication.

It is now accepted as settled law in this State that a Code is not a mere compilation of laws previously existing, but is a body of laws duly enacted, *State v. Towery*, 143 Ala. 48, 39 So. 309; *Bush v. Greer*, 235 Ala. 56, 177 So. 341; Opinion to Hon. John C. Curry, Commissioner of Revenue, Capitol, under date of July 18, 1941, Quarterly Report, Attorney General, Vol. XXIV, page 39. Of course, exceptions to this rule are those laws saved by specific provisions contained in the Code. For example, see Code of Alabama, 1940, Title 1, Section 9. However, Act No. 54, supra, is not within this category, and you are advised that the same ceased to be the law of this State from and after the effective date of the Code of Alabama, 1940.

Consequently, Act No. 54, supra, authorizing the manufacture and sale of near beer in Alabama, and its companion acts (Acts Nos. 89 and 112, supra) may now be said to have been consigned to the limbo of things which have served their purpose. *Southern Industrial Institute v. Lee*, 234 Ala. 404, 175 So. 365.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 6, 1942

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Officers—Court of County Commissioners—Vacancies in office—
Conviction of felony—

1. The word "reversed" as used in Section 162, Title 41, Code of 1940, means an ultimate decision.

2. One who voluntarily abandons an office must be reappointed to such office before he can reassume the duties of the office.

3. The Court of County Commissioners may ratify employment of labor and purchases of materials by individuals and pay for same.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your inquiry dated December 31, 1941, in which you request an official opinion as follows:

"You are familiar with the case of Commissioner J. R. Brown, convicted in Dale Circuit Court on a charge of forgery and carried to the Court of Appeals where it was reversed and remanded.

"While his case was pending before the Court of Appeals he was suspended from the office of County Commissioner, under Title 41, Section 162, of the 1940 Code. Mr. P. O. Woodham was duly appointed to fill the vacancy thus created, and performed the duties of the office until Mr. Brown's case was reversed and remanded by the Court of Appeals. At that time, Mr. Brown, acting under the above section, resumed the duties of the office and Mr. Woodham retired. Mr. Brown has been serving as Commissioner since the action on his case by the Court of Appeals.

"Today, counsel for Mr. Brown have notice that this case is being carried by the State to the Supreme Court for rehearing.

"I want your opinion on the following points:

"1. Has Mr. Brown been in office legally since the Court of Appeals reversed his case?

"2. If so, is he again suspended pending a rehearing before the Supreme Court?

"3. If he is now suspended, can Mr. Woodham again serve to fill such vacancy without again being appointed?"

"4. If Mr. Brown has not not been in office legally since the reversal of his case, can Commissioners Court legally pay claims for labor and materials incurred by him against the County?"

"5. Can the Commissioners Court pay salaries of the road machine operators in Mr. Brown's district, all of whom are employed by the full court, for the time since he resumed office?"

The answer to the first two questions propounded by you involve a consideration of Section 162, Title 41, Code of 1940, which is as follows:

"§ 162. Sentence of officer to the penitentiary vacates office.—When any person, holding any office or place under the authority of this State, is sentenced by any court of the United States, of this state, or any state, to imprisonment in the penitentiary, or hard labor for the county, his office or place is vacated from the time of the sentence; and if the judgment is reversed, he must be restored; but if pardoned, he must not."

It will be noted from the above quoted Code section that any person holding any office under authority of the State of Alabama who has been sentenced to imprisonment in the penitentiary, or to hard labor for the county, vacates his office from the time of such sentence. It will further be noted that upon a reversal of the judgment, such person must be restored to the office held by him.

This section has been held to apply to county offices. *Stone v. State*, 213 Ala. 130, 104 So. 894.

Upon investigation in the office of the Clerk of the Court of Appeals, I find that the case of *State v. J. R. Brown* is now pending on application for rehearing before said Court. This case was reversed by the Court of Appeals and the application for rehearing was filed on behalf of the State of Alabama.

I have found no cases of the appellate courts of this state dealing with this section in regard to the interpretation of the word "reversed." However, it is my judgment that the word "reversed," as used in this section, contemplates a final reversal. *King v. Sloan*, (Pa.) 1 Serg. and R. 77. In other words, I do not believe it could be said that a case is reversed, within the meaning of this section, until the parties to the cause have lost all right of review by a superior tribunal.

The Court of Appeals of the State of Alabama will not lose jurisdiction of this case until after it has acted upon the application for rehearing filed on behalf of the State of Alabama, and the time has expired within which to file a petition for a writ of certiorari to the Supreme Court. After the rehearing is acted upon by the Court of Appeals, either the defendant or the State of Alabama has fifteen days in which to file a petition for a writ of certiorari to the Supreme Court. Upon award or denial of such petition for writ of certiorari, either party has a period of fifteen days within which to apply for rehearing.

You are, therefore, advised that in my opinion Mr. Brown has not legally been in office since the Court of Appeals reversed his case. You are further advised that in my judgment, Mr. Brown cannot be legally restored to office until his case has been finally reversed by a court of last resort. Reversed, in its technical sense, applies to the ultimate decision. *King v. Sloan*, supra.

My answer to your first question does away with the necessity of answering your second question.

In answer to your third question, you are advised that in my opinion Mr. Woodham would have to be reappointed before he could assume the duties as a member of the Court of County Commissioners of your County.

It appears from your letter of inquiry that Mr. Woodham voluntarily abandoned his office under the mistaken belief that Mr. Brown was entitled to reassume his duties. This being true, Mr. Woodham has abandoned said office and, in my opinion, cannot reassume the duties of the office until he has been reappointed. *Rainwater v. State*, 237 Ala. 482, 187 So. 484.

In answer to your fourth question, you are advised that in my opinion, upon the other members of the Court of County Commissioners ratifying the claims for labor and materials incurred by Mr. Brown against the county, such claims may be legally paid. Quarterly Report of Attorney General, Volume IX, page 33; Quarterly Report of Attorney General, Volume XVII, page 299; Biennial Report of Attorney General, 1928-30, page 591.

It appears from your fifth inquiry that the road machine operators in Mr. Brown's district were employed by the full Court. This being true, it is my opinion that the salaries of such road machine operators may be legally paid. Cf. the opinions cited in answer to your fourth inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 16, 1942

Hon. A. W. Gwaltney,
Tax Collector,
Houston County,
Dothan, Alabama

Poll Tax—

Although February 1, 1942, falls on Sunday, a tax collector has no authority to receive or receipt for poll taxes on the following Monday, February 2, 1942.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion under date of January 8, 1942, is as follows:

"As February 1st, 1942 falls on Sunday, I would like to know whether or not I, as Tax Collector, have any authority to collect poll tax payments on Monday, February 2nd.

"Title 51, Section 243 of the Code of Alabama for 1940 provides as follows:

"After the first day of February and before the first day of next October, the tax collector shall have no authority to receive or receipt for poll taxes due by any person."

"My inquiry is, under this section, with February 1st being on Sunday, do I have authority to receive poll tax payments on Monday, February 2nd?"

In answering your inquiry, I am constrained to hold that you do not have authority to receive or receipt for poll tax payments on Monday, the second day of February, 1942.

Title 51, Section 243 of the Code of Alabama, 1940, expressly prohibits you from receiving or receipting for poll taxes after the first day of February. This section accords with Sections 178 and 194 of the Constitution of Alabama, 1901. See *Frost v. State ex rel Clements*, 153 Ala. 654, 45 So. 203.

In *Ex parte Bullen*, 236 Ala. 56, 181 So. 498, our Supreme Court said:

"The requirements of residence in the State, county and precinct or ward in said section of the Constitution (Section 178 of the Constitution of Alabama, 1901), are set down along with the requirement of registration and payment of poll tax for the year 1901 and each year thereafter, 'on or before the first of February next preceding the date of the election at which he offers to vote,' and it has been ruled here that one who has not paid his poll tax as required therein is not an elector and is disqualified to hold office. *Frost v. State ex rel. Clements*, 153 Ala. 654, 45 So. 203; *Davis v. Teague*, supra; *Finklea v. Farish*, 160 Ala. 230, 49 So. 366." (Emphasis supplied)

The rule of computing time (Title 1, Section 12, Code of 1940) is not applicable, as the constitutional and statutory provisions, supra, do not prescribe a certain number of days for you to receive poll tax payments, but, on the contrary, fixes a date after which you are prohibited from receiving or receipting for poll taxes. In 62 Corpus Juris, paragraph 49, at pages 1000-1001, it is said:

"(49) C. Sunday and Holidays. — 1. Last Day Falling on Sunday or Holiday. * * * The rule applies, however, only where there is some act to be performed on the last day, which is Sunday, and hence it does not ap-

ply where Sunday is the last day of a period which is fully to elapse before the act is to be done."

I refer you to an opinion of this office to Hon. C. E. Sellers, Tax Collector, Pike County, Troy, Alabama, under date of April 2, 1936 (Biennial Report of Attorney General, 1934-36, page 611), wherein it was held as follows:

"Under Section 3034 of the 1923 Code of Alabama (a forerunner of Title 51, Section 243, Code 1940) a tax collector is prohibited from receiving and receipting for poll tax after the first day of February and before the first day of next October, although he has misinformed a taxpayer as to amount of poll taxes due."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 19, 1942

Hon. R. H. Wharton, Pres.,
Commission of Jefferson County,
Birmingham, Alabama.

Licenses—Counties—Federal and State Excise Taxes—Sales of
Matches and Tobacco Products to County Agencies—

Invoices of sales of matches and tobacco products to county agencies, which include the amount of federal manufacturer's excise tax and/or state license taxes, are legally payable by county.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of December 11, 1941, is as follows:

"We desire clarification of the following:

"1. The State of Alabama requires Tobacco Dealers to put stamps on snuff and Tobacco, which is a tax.

"The dealers in charging or invoicing Jefferson County pass on to Jefferson County the charges for the stamps.

"Is it legal for Jefferson County to pay an invoice for such tax?

"2. The Federal Government taxes matches, and the vendor in invoicing Jefferson County for matches adds such tax to its invoice.

"Is such an item of tax on the invoice for matches a legal expenditure for Jefferson County?

"3. As a third inquiry, the Federal Government in certain instances places certain taxes on articles and the vendors in invoicing such items make a flat charge for the items including the taxes, and in such cases do not make an additional charge for the taxes.

"We have in mind particularly snuff and tobaccos, purchased by Jefferson County, wherein the invoice price includes such Federal tax.

"Are such 'Hidden' taxes a legal payment by Jefferson County?

"We are holding up some invoices until the above questions are answered, and will appreciate your opinion at your earliest convenience."

As to your first inquiry, relating to the legality of the payment by Jefferson County of an invoice of sale of tobacco products purchased by Jefferson County from a dealer therein, you are advised that, in my opinion, such an invoice legally may be paid by Jefferson County.

Article 9, Title 51 of the Code of Alabama, 1940, relating to license for the privilege of dealing in tobacco products, provides, in Section 718 thereof, in part:

"* * * every person, firm, corporation, club or association, * * * who sells or stores or receives for the purpose of distribution * * * within the State of Alabama, cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or any substitute therefor, either or all, shall pay to the State of Alabama for state purposes only a license or privilege tax which shall be measured by and graduated in accordance with the volume of sales of such person, firm, corporation, club or association in Alabama. * * * "

And in Section 719 thereof, it is provided, in part, as follows:

"The license taxes imposed by this subdivision, shall be paid by affixing stamps in the manner and at the time herein set forth. In the case of cigars, stogies, cheroots, chewing tobacco and like products, the stamps shall be affixed to the box or container in which or from which normally sold at retail. In the case of cigarettes, smoking tobacco and snuff, the stamps shall be affixed to each individual package. Time allowed for affixing stamps shall be as follows: Every wholesale or retail dealer in this state shall immediately after receipt of any unstamped cigars, stogies, cheroots, chewing tobacco, cigarettes, smoking tobacco or snuff, unless sooner offered for sale, cause the same to have the requisite denominations and amount of stamp or stamps to represent the tax affixed as stated herein, and to cause same to be cancelled by writing or stamping across the face of each stamp the registered number of such wholesaler or retailer, said number to be furnished by the department of revenue. * * * "

And in Section 729 thereof — the section dealing with sales affording a basis for exemption to the vendor — it is provided in part:

“Provided, further, that any goods, wares, or merchandise enumerated herein, that are sold to the United States Government for army, navy, or marine purposes, and which shall be shipped from a point within this state to a place which has been lawfully ceded to the United State Government for army, navy, or marine purposes, shall be subject to the same provisions as hereinabove mentioned for goods, wares or merchandise sold or shipped to another state. (We interpolate, that the provisions mentioned are to the effect that sales made to any person, firm, corporation or association of persons in another state do not afford a basis for exemption from taxation.) Provided, further, that in case of goods, wares or merchandise enumerated herein, which shall be sold or delivered to ships belonging to the United States navy for distribution and sale to members of the military establishment only, or sold and delivered to ships regularly engaged in foreign or coast-wise shipping between points in this state and points outside this state, shall be subject to the same provisions as hereinabove mentioned for goods, wares, or merchandise sold or shipped to another state. Provided, further, that the department of revenue may promulgate rules and regulations from time to time to prevent any abuse of the provisions contained herein. * * * ”

I have made inquiry at the office of the Tobacco Tax Division of the State Department of Revenue concerning whether or not any regulation has been promulgated by that agency which has the effect of constituting sales to counties or county agencies a basis of exemption to the vendor, and have been advised that no such regulation has been promulgated, and that the administrative practice has been to impose the taxing provisions of the statute in cases of such sales.

There is no inherent exemption granted to the taxpayer (the vendor of the tobacco products) by reason of the fact that he makes sales to agencies of the county. The license is laid upon the seller for the privilege of engaging in the business of dealing in tobacco products. Its effect upon the county, as relates to sales of tobacco products made to the county, is incidental rather than direct. There is no compelling inference to be drawn from the statute that the Legislature intended that the taxpayer (the vendor) should be afforded exemption on account of his sales of such products to county agencies. As a matter of fact, the specific designation of the classification of sales to agencies of the United States for distribution to the military establishment as a basis for exemption to the taxpayer, without any sort of reference to such a classification for sales to county agencies, is strongly persuasive that the classification as to sales to United States agencies was the only one which the Legislature intended, as a basis for exemption to the taxpayer (the vendor).

In the absence of some specific provision of the statute designating sales to county agencies as a basis for exemption to the taxpayer, and in the absence of compelling inference arising from the statute that such was the intention of the Legislature, it seems that the expositor of the statute is ineluctably drawn to the conclusion that sales to county agencies are to be included in determining the amount of the license tax payable by the vendor.

Your second and third inquiries, relating to the federal taxes laid upon persons dealing in matches and tobacco products, have been concluded by the Supreme Court of the United States in the case of **Massachusetts v. United States** (and companion cases), 299 U. S. 383-387, 81 L. ed. 294 et seq.

In that case the State of Massachusetts had sued in the United States Court of Claims to recover the amount of the federal tax imposed upon tobacco products in relation to sales made to that Commonwealth for free distribution to patients in Boston State Hospital, an institution maintained by the Commonwealth and alleged to be a State governmental instrumentality immune from federal taxation. Upon review of the case, the Supreme Court, speaking through Mr. Justice McReynolds, said:

"If, in reality, the tax was upon the manufacturer of tobacco then, as adequately pointed out by *Cornell v. Coyne*, supra, the effect upon the purchaser was indirect and imposed no prohibited burden. * * * We think that was the true nature of the exaction, *** .

"The tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less. True the limit of time for making payment is when the product is sold or removed, but this is a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal. Apparently, the practice is to affix the required stamps without regard to sale or removal. * * * "

Cf. Quarterly Report, Attorney General, Vol. VIII, page 148.

The federal manufacturer's excise tax on matches (U. S. C. A. Title 26, Section 3409) is characteristically similar to the federal tobacco tax; and is governed by the same rules of law, insofar as they relate to your inquiry.

In the light of that decision, we must hold that invoices covering the sale of matches and tobacco products to Jefferson County, which include the amounts of federal taxes levied upon such products and paid by the manufacturer thereof, properly may be paid by the county. See U. S. Internal Revenue Code, U. S. C. A. Title 26, Sections 2000 et seq. and Section 3409.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 19, 1942

Hon. H. G. Greer,
Superintendent of Education,
Monroe County,
Monroeville, Alabama.

Municipalities—Schools and School Districts—Taxation—

1. A Municipality may use surplus in fund derived from special five-mill tax levied, pursuant to Eighth Amendment to the Constitution of Alabama, 1901, for a special purpose, for any legitimate municipal purpose.

2. Making of needed repairs and purchasing of equipment for local schools in municipality is legitimate municipal purpose, even though title to school buildings is in County Board of Education, and the schools are under the supervision and control of such board.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of December 2, 1941, is as follows:

"The Town of Monroeville under a special constitutional provision is levying a special school tax levy of five mills made heretofore for the purpose of carrying out the Town's contract with the Board of Education of Monroe County relative to purchasing certain lands and the erection of certain school buildings, repairs and equipment for same in the Town of Monroeville. ---

"There has accumulated in this fund a sum of approximately \$3,000.00 more than is necessary to take care of the obligations of the town with said Board of Education as these obligations have matured.

"The Town of Monroeville wishes an opinion from you as to whether this surplus may be released to the local school authorities (through and with the permission of the Monroe County Board of Education) for the purpose of making certain needed repairs and purchasing equipment for the local schools of Monroeville.

"Accompanying this request for an opinion is submitted numerous documents from the transactions of the town of Monroeville and the Monroe County Board of Education relative to this matter."

In connection with the above request, you have furnished me with the following documents: (1) A copy of a resolution of the Town Council of the Town of Monroeville, Alabama, adopted at a special meeting of said Council held on July 23, 1935; (2) a copy of a resolution of the Town Council of the

Town of Monroeville, Alabama, adopted at a regular session of said Council, held on the fourth Tuesday in August, 1935; (3) a copy of the contract between the Monroe County Board of Education and the Town of Monroeville, Alabama, made and entered into on October 25, 1935, as reflected by a resolution adopted at a special meeting of the Monroe County Board of Education held on November 12, 1935; and (4) a copy of a resolution of the Town Council of the Town of Monroeville, Alabama, adopted at a meeting of said Council held on November 12, 1940.

These documents show: That in the year 1935 negotiations were under way between the Monroe County Board of Education and the Federal Government, or an agency thereof, looking toward the expansion and enlargement of the public school facilities in the Town of Monroeville, Alabama, which facilities are under the supervision and control of the Monroe County Board of Education, which program called for the purchase of additional lands for the public school system in said town, construction of additional buildings as a part of said system, additions and repairs to existing buildings in said system, and the equipment of such buildings for public school purposes, forty-five per cent of the cost of the same to be borne by the Federal Government, or an agency thereof, and the remainder of the cost to be borne by the Monroe County Board of Education. The Town of Monroeville, Alabama, acting by and through its Town Council, agreed to pay a part of the cost of said program, provided the same was completed, and provided the qualified electors of said town authorized the levying of a special five-mill tax, at an election held pursuant to the provision of the Eighth Amendment to the Constitution of Alabama, 1901, for the purpose of raising the funds with which to pay the same. The election was held in said town, pursuant to the provisions of the Eighth Amendment, supra, and resulted in a majority of the qualified electors thereof participating therein voting in favor of the levying of the tax for a stipulated number of years. The program was completed, and the Town of Monroeville, Alabama, entered into a contract with the Monroe County Board of Education to pay to said Board of Education the principal sum of \$17,500 with interest thereon at the rate of four and one-half per cent per annum from January 1, 1936, said amount to be paid in annual installments of stipulated sums of principal and interest on July 1 of each of the years enumerated in said contract, (all of the same being during the life of the said special five-mill tax authorized to be levied by the Town of Monroeville, Alabama, in the election hereinabove referred to) from the fund derived from the proceeds of said special five-mill tax. Each year since that time the Town of Monroeville, Alabama has levied the special five-mill tax, authorized in the election hereinabove referred to, and is continuing to levy the same, and has paid to the Monroe County Board of Education, from the fund derived from the proceeds of said tax, the annual installments of stipulated amounts of principal and interest on its obligations to said Board as the same became due, pursuant to the terms of its contract with said Board.

You state in your letter of inquiry that there has accumulated in this fund, i. e., the fund derived from the proceeds of this special five-mill tax, some \$3,000, after the payment of each annual installment of principal and interest on this obligation as the same became due, and ask if the Town of Monroeville, Alabama has the legal power and authority to release or appropriate this surplus to the local school authorities in said town, through and with the permission of the Monroe County Board of Education, for the purpose of making certain needed repairs and purchasing equipment for the local schools in said town.

In my opinion, this question should be answered in the affirmative.

The Eighth Amendment to the Constitution of Alabama, 1901, which is applicable to the municipality or Town of Monroeville, Alabama, pursuant to which this special five-mill tax was levied, provides in pertinent part:

" * * * provided further, that a majority of the qualified electors of any of said municipal corporations voting at an election called for that purpose may vote a special tax not to exceed one-half of one per centum in any one year for any special purpose or purposes, which tax shall be used only for the purpose or purposes for which same is levied and collected; * * * "

The purpose for which this special five-mill tax was levied is stated in the resolution of the Town Council of the Town of Monroeville, Alabama, calling the election at which the same was authorized to be levied, and the resolution of said Council declaring the results of said election as follows (the quotation is from the resolution calling the election):

"This Town Council does hereby call an election in said Town of Monroeville, Alabama, at which said election the qualified electors of said town shall have the privilege of voting upon the question of whether or not the Town Council of said town shall be authorized to levy during each of the tax years from 1935 to 1946, both inclusive, a special tax upon the taxable property situated in said town for the purposes of paying the amount or amounts said town has agreed or hereafter agrees to contribute toward the purchase of additional lands, the construction of additional buildings, additions to present buildings, and equipment for buildings for school purposes, all for public school site, public school buildings, and equipment therefor, in said Town of Monroeville, Alabama. The rate of such special tax shall not exceed in any one year one-half of one per centum." (Emphasis supplied)

Since the quoted excerpt from the Eighth Amendment, supra, pursuant to which said special five-mill tax was levied, provides that said tax shall be used only for the purpose or purposes for which same is levied and collected, and the same was levied and collected for the purposes hereinabove set out, it becomes necessary to determine whether or not the surplus in the fund derived from the proceeds of said tax, over and above the amount necessary for the purpose for which the same was levied and collected, i. e., the payment of the annual installments of principal and interest on the obligation which the Town of Monroeville, Alabama, has with the Monroe County Board of Education, pursuant to the contract hereinabove referred to, as the same become due, may be used for some other purpose, instantly, the making of certain needed repairs and the purchasing of equipment for the local schools in said town.

In the case of **Board of Revenue, Shelby County v. Farson, Son & Company**, 197 Ala. 375, 72 So. 613, the Court had under consideration the question of the use of the proceeds of a special tax of two and one-half mills, levied by Shelby County under the provisions of Section 215 of the Constitution of Alabama, 1901, and the statutory provisions giving effect to the same, to be used exclusively in the payment of an indebtedness incurred by said county in the construction of a courthouse, and stated, as here pertinent, as follows:

"We gather from the record that the special tax of one-fourth of 1 per cent. will yield a sum more than sufficient to pay the courthouse installments as they become due, and the surplus, if any, may, of course, be applied to the road or bridge indebtedness referred to herein."

The effect of this case is stated as follows in headnote 5 thereof:

"Counties; Special Fund; Diversion.—Under § 138, Code of 1907, where a special tax has been levied for a special purpose, a board of county commissioners may employ any excess of the proceeds of such tax over the needs of the special purpose, to other legitimate purposes of the county."

In the later case of *Jefferson County v. Henry*, 204 Ala. 381, 86 So. 44, the Court considered the effect of this holding in the case of *Board of Revenue, Shelby Court v. Farson, Son and Company*, supra, and distinguished it from the holding made in that case, in the following language:

"Counsel for petitioner cites as authority for his contention the case of *Board of Revenue of Shelby County v. Farson*, 197 Ala. 375, 72 South. 613, L. R. A. 1918B, 881. That case is not in point, however, for two reasons: (1) The statute under which the special tax was levied for building a county courthouse (Code, § 138) does not direct or limit the disposition to be made of any surplus of the tax; and (2) the opinion goes no further than to say that such a surplus could be applied to other county debts after the installments due on the courthouse were paid."

On the basis of these authorities, it is my opinion that the surplus in the fund derived from the proceeds of this special five-mill tax, over and above the amount necessary for the purpose for which the same was levied and collected, i. e., the payment of the annual installments of principal and interest on the obligation which the Town of Monroeville, Alabama has with the Monroe County Board of Education, pursuant to the contract between them, hereinabove referred to, as such installments become due, may be used by said town for any other legitimate municipal purpose. That the making of needed repairs and the purchasing of equipment for the local schools in the Town of Monroeville, Alabama, is a legitimate municipal purpose of said town, is definitely settled by the case of *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496. In that case the court had under consideration the right of a municipality to issue general obligation bonds of the municipality, with which to pay one-half the cost of a new elementary school building to be erected within its corporate limits, the title to which was to be in the County Board of Education of Winston County, and the school to be located in the same also being under the supervision and control of said Board. It was held in that case that the then applicable statutory provisions, which were the forerunners of Code of Alabama, 1940, Title 37, Chapter 6, Article 2, Sections 274 et seq., and particularly Section 276, invested the municipality with such authority, even though it would not have the title to the school building, and the school was under the control of the County Board of Education. I quote from the opinion of the court in that case as follows:

"True, the municipality may not have title to the school building, and it may be under the control of the county board (Gen. Acts, Ex. Sess. 1933, p 81, amending School Code 1927, § 132), and the affairs of the school

be under like control. School Code 1927, § 86. But considerations of this character would deny to the municipal corporation the power to donate any funds to the betterment of the schools located therein, as its public schools, by reason of the population limitation of 2,500, are under the supervision of the county board. Yet the inhabitants of Haleyville receive the benefit and enjoy the privileges of these schools in their midst; and the mere fact that another and independent agency of the state controls their affairs is no reason for a denial of the right of the citizens through their municipal authorities lending aid in support of such institutions.

"The lawmakers, of course, presumably were aware of the restrictions imposed in section 2314 of the Code, and were likewise aware of the fact that in municipalities of less than 2,500 inhabitants the supervision and control of the public schools were with the county board.

"No sound reason appears why such municipalities may not devote surplus proceeds of revenue for the erection or maintenance of such schools located within their corporate limits. The inhabitants receive the benefits, though along with others in territory surrounding." (Emphasis supplied)

The premises considered, it is my opinion that the Town of Monroeville, Alabama, has the authority to release or appropriate the surplus in the fund derived from the proceeds of said special five-mill municipal tax, levied pursuant to the provisions of the Eighth Amendment to the Constitution of Alabama, 1901, for the purpose of paying the annual principal and interest installments on the obligation which it has with the Monroe County Board of Education, under the contract entered into between said town and said board, over and above the amount necessary to pay such annual principal and interest installments as the same become due, to the local school authorities in the Town of Monroeville, Alabama, through and with the permission of the Monroe County Board of Education, for the purpose of making needed repairs and purchasing equipment for the local schools in said town.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 19, 1942

Hon. Simon Wampold,
Chief Clerk, Probate Office,
Montgomery County,
Montgomery, Alabama.

Code 1940, Tit. 10, §37—Code 1923, § 6972.

Corporations—Increased Capital Stock—Probate Judge—Fees—

1. No fee for examining reports of increase of capital stock should be charged by the probate judge with respect of reports filed under Code 1923, §6972, prior to May 31, 1941.

2. A fee of \$2.50 should be charged by the probate judge for examining such reports on and after May 31, 1941, pursuant to Code 1940, Tit. 10, §37.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

We have your letter of January 9, 1942, in which you request an official opinion as follows:

"At this time this office is being audited by State Examiners and a question has arisen, and it is necessary that we have an opinion to determine this question.

"We are being examined for the year beginning October 1, 1940 and ending September 30, 1941. It is the contention of this office that when a corporation files a notice of increased capital stock that this office make only the charge of \$1.00 per thousand charter fee for additional capital and the recording fee for recording the instrument and this has been the practice over a period of years and all auditors for the past six years who have examined this office have accepted this as the correct practice.

"The present auditors, however, are contending that when a certificate of increased capitalization is filed that we should charge in addition to the charter fee and the recording fee, \$2.50 examination fee and we demur from this opinion and are submitting the question to you. The examiner calls our attention to Title 10, Section 37, which reads: 'Fees upon filing report.—Upon the filing of the report, there shall be paid to the probate judge the same fees for recording and examining as for an original incorporation, and charter fee upon proposed increase of capital stock, and the probate judge shall within ten days after the filing of the report cause to be filed in the office of the secretary of state a statement of like nature as that provided for in section 11 of this title. * * * We note, however, the Editor's Note and also that this section refers back to 6972 of the Code of 1923, which reads: 'Fees for increasing capital stock.—Before the report of the proceedings of the stockholders increasing the capital stock of the corporation shall be filed, the corporation shall pay to the judge of probate, to be reported to the state auditor, **AND PAID INTO THE STATE TREASURER AS ABOVE PROVIDED**, the fees as above prescribed upon the increase of such capital stock,' etc.

"You will note that it states and 'paid into the State Treasury as above provided' and the examination fees which the auditors propose to charge against us are not paid into the State Treasurer but are paid into the County Treasurer the same as recording fees.

"On an original charter filed in the office of the Judge of Probate the following charges are made: \$1.00 per thousand charter fee, with a

minimum of \$5.00, \$2.50 Secretary of State fee, and \$2.50 examination fee plus recording fee of 15c per hundred words.

"It is the contention of this office that this \$2.50 examination fee charged on the original incorporation papers is for the purpose of examining this charter and determining if it complies with laws of the State of Alabama, but when we receive an increased capitalization we make no examination other than to subtract the original capitalization from that stated in the increase and charge the charter fee of \$1.00 per thousand additional capital stock, plus as said before the recording fee.

"In determining the correctness or incorrectness of our stand in the above, will you also state whether the examiners should confine themselves in an examination from October, 1940 to October, 1941, to the Code of 1923 or if we should be responsible under the Code of 1941.

"P. S. Note the difference in the wording of Section 6972 of the Code of 1923 and Title 10, Section 37 of the Code of 1941."

Code 1923, §6972, above quoted in pertinent part, did not, in my opinion authorize the probate judge to collect or charge a fee of \$2.50 for examination of the report of the proceedings of stockholders increasing the capital stock of a corporation already organized. Said section required only payment of the so-called charter fees of \$1 per thousand dollars of the increased capital stock, which the probate judge was required to report to the State Auditor and pay into the State Treasury. Code 1923, §6971.

Code 1940, Tit. 10, §37, likewise above quoted in pertinent part, was a radical revision or amendment of the corresponding Section 6972 of the Code of 1923, in that it requires the probate judge, upon the filing of the report of increased capital stock, to charge and collect the same fees as are prescribed for recording and examining an original certificate of incorporation in addition to the charter fees due upon the increased amount of capital stock, and to file with the Secretary of State "a statement of like nature as that provided for in Section 11" of said Title 10.

Said Section 11, Title 10, Code 1940, prescribes the form and contents of the statement to be signed and filed by the probate judge with the Secretary of State upon the filing of an original certificate of incorporation in the office of the probate judge, and to said Section 11 the probate judge must now look, of course, as a guide in formulating said statement.

The statutory law of this State as written in the Code of 1940 became operative and effective, by proclamation of the Governor, on May 31, 1941, and supersede, of course, all previously enacted statutes not included therein or inconsistent therewith with certain exceptions not material here. (Code 1940, Tit. 1, §9).

You are advised, therefore, as follows:

1. No fee is to be charged by the probate judge for examination of corporate reports of increased capital stock filed with him as provided by Code 1923, §6972, prior to May 31, 1941.

2. A fee of \$2.50 should be charged by the probate judge for examining such reports filed on and after May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 20, 1942.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Administration of Estates—Costs and Fees—

1. The sheriff is entitled to a fee of \$1.50 for serving notice on next of kin of the time and place of an application for the probating of a will.

2. Where the administration of an estate is removed by order of the judge of the circuit court, sitting in equity, from the probate court to the circuit court, there is no authority of law for recording said order or decree in the office of the judge of probate.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of January 2, 1942, in which you request an official opinion, is as follows.

"Will you please advise me the fee that the Sheriff is entitled to for serving notice upon the next of kin in a proceeding to probate a will under Title 61, Section 48, of the Code, that is, whether the Sheriff is entitled to the sum of sixty-five cents for 'Summoning each witness and returning subpoena,' or \$1.50 for 'serving summons and other me sne process and returning the same' under Title 11, Section 34 of the Code.

"The Sheriff contends that this notice upon the next of kin is a summons or other me sne process and that he is entitled to \$1.50 and an attorney is contending that the fee should be sixty-five cents.

"I have investigated some of the opinions of the Attorney General upon this and I cite them here for your benefit. Opinion found in Quarterly Report, Vol. 16, July-September, 1939, page 9, and it seems the exact question was asked but the Attorney General's opinion was not entirely free of doubt, and this opinion is in Biennial Report 1930-32, page 291. The conclusion I reached from this latter opinion was that the Sheriff is entitled to \$1.50 and I would like to have your opinion upon this question.

"Also will you please advise me in a case where an estate is removed from Probate Court to Chancery, under Title 13, Section 139, and where an order of removal is served upon the Probate Judge, should this decree or order of removal be recorded and if so, would I be entitled to charge the regular fee of fifteen cents a 100 words for recording this decree? It has been my practice to record these decrees, but a question has been raised as to this and I would like to have this question settled also."

Answering your first question, it is my opinion that the sheriff would be entitled to \$1.50 for serving such notice. I call your attention to Title 11, Section 34, Code of 1940, wherein it says:

"Sheriffs are entitled to receive the following fees for the following services: * * *

"Serving summons and other mesne process, and returning the same\$1.50."

Such notice as you refer to above is not a command ipso facto to the person to whom addressed to be present at the hearing, but it simply gives notice to him, as the next of kin, of the time and place of such hearing, at which time he may appear if he so desires. I call your attention to an opinion of this office rendered January 6, 1939, to Hon. W. G. Culp, Sheriff of Chilton County, (Quarterly Report of Attorney General, Volume XVI, page 9). This opinion does not deal with the exact item of costs you have here, but is one of the same import and nature. It involves the sheriff's fee for serving of notices on landowners of a condemnation proceeding in the probate court, and appears to me to be practically analogous to the question you have here, so far as the principle is concerned.

My answer to your second inquiry is in the negative. There is no authority of law for the recording in the probate court of the circuit judge's order of removal of an administration of an estate from the probate court to the circuit court, sitting in equity, under Code of 1940, Title 13, Section 139. There being no authority of law for the recording of the circuit judge's order in the probate court, if it is so recorded by you, as probate judge, you would not be entitled to any fee for so doing.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 20, 1942

Hon. Solomon Tisdale, Clerk,
Circuit Court, Covington County,
Andalusia, Alabama.

Witnesses—Compensation—Issuance of certificate of attendance—

Clerk of Circuit Court who accepts from a convicted defendant any sum less than all costs, including compensation of all witnesses who may prove their attendance, within five days of their attendance, does so at his own peril.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 17, 1941, in which you request my opinion as follows:

"Please enlighten me as to the following questions:

"I have been having trouble with witnesses about their attendance certificates. When the Judge discharges all witnesses in a case, how long do they have to prove their attendance? I find in the 1940 Code that they have five (5) days limitation for the proving up of their attendance. But in this particular case, when a defendant has been tried and is found guilty and his punishment is fixed at a fine and the costs of the case, and the defendant is ready to pay the fine and costs and comes to the office with the Sheriff to pay the costs, should I prove up all witnesses that attended Court in the case to add in this costs or should I wait for the witnesses to come in and prove up for their attendance? If so, how long should I have to wait for the witnesses to prove up their attendance, as the defendant is always ready to pay his fine and costs in a case like this, and if I have to wait five (5) days for the witnesses to prove up their attendance, the Judge will either have to order the Defendant to wait in jail five (5) days until the witnesses have proved up. Some of the witnesses have been coming in after the Defendant has paid his fine and costs and wanting to prove up their attendance which was not proved up at the time the defendant paid his fine and costs in the case, and they tell me that they have five (5) days to prove up."

As I understand your problem, it has to do with cases in which a defendant is convicted and desires to pay the fine and costs imposed upon him immediately thereafter, rather than to wait in custody until the five-day period allowed to witnesses by Title 11, Section 46, Code of 1940, within which to prove their attendance as such witnesses, has expired.

Section 46, *supra*, provides:

"§ 46. **Attendance; when proven.**—The witness must prove his attendance within five days after his attendance as such witness."

This office has held that the above requirements applies in criminal as well as in civil cases. Biennial Report, Attorney General, 1930-32, page 613.

In Biennial Report, Attorney General, 1936-38, pages 643, et seq., this office held "that a clerk of the circuit court cannot issue a witness certificate unless claim for the same is made within five days *** ." **Friddle v. Braun et al.**, 7 Ala. App. 429, 61 So. 57.

You will note that Section 46, supra, requires the witness to prove his attendance within five days "after his attendance as a witness." This is a change, new to the 1940 Code. Under its predecessor, the witness was required to prove his attendance within five days "after adjournment of the session of the court at which he attended."

Answering your question, it is my judgment that you, as Clerk, have no right to speculate upon whether or not all witnesses entitled to prove their attendance in a given case, will, in fact, prove their attendance within the five days allowed by law; and that you cannot, except at your peril, compute the witness fees for which a convicted defendant is liable until (1) all of the witnesses who are entitled to prove up their claims against the said defendant have, in fact, proven them; or (2) five days have expired since the attendance of the said witnesses, whichever event last transpires.

If, however, a defendant desires to pay the fine and costs immediately after his conviction, and before you, as Clerk, can know for a certainty whether all of the witnesses will, in fact, prove their attendance within the time provided by law and claim compensation therefore, you may in your capacity as a private individual as contradistinguished with your capacity as an officer, agree to hold in your hands, as such individual, the amount of the compensation of all of the witnesses who **might** prove their attendance as a claim for which the convicted defendant would be liable; with further agreement (as an individual) that, in the event that any of the witnesses did not, in fact, prove their attendance within the five-day period allowed by law, you (as an individual) would return to the defendant the amount held by you over and above the sum sufficient to pay the compensation of the witnesses who have lawfully proved their attendance within the time allowed by law.

Former opinions of this office (Quarterly Reports of the Attorney General, Vol. IX, p. 50; Vol. XXIV, p. 86, and the opinions therein cited) which held that a clerk of a court, in his official capacity as such, might legally "estimate" the amount of compensation of witnesses who had not legally proven their claims therefor, and require the defendant to pay the "estimated" compensation, with provision for refund of any surplus which subsequently developed, must be modified to conform herewith.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 20, 1942

Hon. Howard Kirby, Clerk,
Circuit Court, Etowah County,
Gadsden, Alabama.

Costs and Fees—Joint prosecutions—Severance—

Where two or more persons are jointly indicted or warrant is issued on a complaint charging the defendants jointly with having committed a criminal offense, a plea of guilty by one of the defendants is an effectual severance, and costs are taxed accordingly.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of December 29, 1941, in which you request an official opinion, is as follows:

"Please render to me your opinion on the following matter:

"A case has been docketed against four (4) defendants in County Court charge with affray, all four being jointly charged in one warrant. In the event one of these defendants should come into Court and plead guilty and the others indicate their intention of going to trial at a later date I would like to know how I should tax the costs against the defendant pleading guilty, there being no severance granted."

If there are two or more defendants charged in the same affidavit or indictment with an offense and one of the defendants pleads guilty and the others stand trial, this is effectual as a severance and you should assess and collect the costs as you would had there been in fact a demand for a severance. *Callaway v. State*, 103 Ala. 27, 15 So. 821; *Woodley v. State*, 103 Ala. 26, 15 So. 820.

These cases hold that a plea of guilty by one joint defendant causes a severance as between him and the other co-defendants.

The whole amount of the costs which have accrued up until the time of the interposition of the plea of guilty are chargeable against the defendant who pleads guilty. He must also be taxed with all of the costs subsequently accruing which are incurred on account of his plea of guilty including the costs of judgment rendered thereon. This for the reason that in case of joint prosecution, all defendants who are adjudged guilty are jointly and severally liable for the common costs incurred on their joint prosecution. *Newman v. State*, 160 Ala. 102, 49 So. 786, of *Woodruff v. State*, 8 Tanner (Ind.) 521.

If and when the others jointly charged with the one entering the plea of guilty are subsequently convicted, all are jointly and severally liable (among themselves and with the defendant who has pleaded guilty) for all

of the costs of the cause which had accrued up to the time of the interposing the plea of guilty (severance). And those subsequently convicted are further jointly and severally liable among themselves for all costs incurred in their prosecution after the time of the interposing of the plea of guilty by their co-defendant.

However, no double exaction of costs may be had. If any defendant, by payment or by hard labor, satisfies items of costs for which he and others are jointly and severally liable, he is entitled to contribution pro rata from the others. *Newman v. State*, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 20, 1942

Hon. R. G. Redden,
Solicitor, Lamar County,
Vernon, Alabama.

County Courts—Issuance of alias warrants—Authority to designate witnesses—

1. The judge of the county court is the only one authorized to issue alias warrant against a defendant when a forfeiture has been taken in said court.

2. The judge of the county court, the solicitor, and the justice of the peace are the only ones authorized to designate who should be summoned as witnesses for the State in cases in the county court.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your letter of December 16, 1941, in which you request an official opinion, is as follows:

"Please give me opinion on following:

"Forfeiture is taken against defendant in case of Illegally Possessing Prohibited Liquors and conditional judgment taken against him and his sureties on bond. The law requires an Alias warrant issued. Please inform me if the Clerk of the County Court (in which forfeiture is taken) issues the alias warrant or the Judge of the county court.

"Also please inform me if the County Solicitor or Deputy Solicitor is the one who says what witnesses are to be summoned for the State or who.

is the one. It is important in my opinion that the list of witnesses for the State should be furnished by the County Solicitor as a matter of economy, otherwise it can cost the County a great deal, unnecessarily."

Answering your first question, it is my opinion that the judge of the county court must issue and sign the alias warrant of arrest, after forfeiture against the defendant and the sureties on his bond.

Title 13, Section 340, Code of Alabama, 1940, which provides for alias warrant after forfeiture in the county court, is as follows:

"§340. Alias warrant of arrest or subpoena.—When a forfeiture has been taken against a defendant and the sureties on his bail bond, it shall be the duty of the court to issue another warrant of arrest against the defendant, upon which the same proceedings shall be had as upon the original warrant; and when a forfeiture has been entered against a witness for non-attendance another subpoena may be issued for him, upon which the same proceedings may be had as upon the original subpoena."

Under the foregoing section, there is no authority in the clerk of the circuit court, as ex officio clerk of the county court, to issue and sign an alias warrant of arrest.

An opinion of this office appearing in Quarterly Report of Attorney General, Volume VIII, page 254, wherein it holds to the contrary, is, to that extent, hereby overruled.

Answering your second question, the duty to direct the summoning of State witnesses in the county court is a prerogative of the judge, the solicitor or the justice of the peace, as the case may be. The judge or the justice on issuing a warrant should set out a list of the witnesses to be summoned for the State and thereafter it becomes the duty of the solicitor to designate such further and additional witnesses desired. To handle this matter otherwise and allow the indiscriminate issuing of subpoenas for witnesses, would, as suggested in your request, perhaps run the costs to an unreasonable amount and would no doubt result, in many cases where a conviction is had, in a motion by the defendant to retax costs shown to be chargeable for witnesses unexamined and unnecessary to the conviction.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 20, 1942

Hon. D. L. Rosenau, Jr.,
Judge, Municipal Court,
Limestone County,
Athens, Alabama.

Local Acts, 1931, page 167 — Act No. 362, S. 423, approved July 6, 1931 —

Limestone County—Municipal Court of Limestone County—

1. Judge of Municipal Court of Limestone County has authority to take acknowledgments of deeds, mortgages, etc. and to solemnize marriage ceremonies.

2. Although no official seal is provided for the Municipal Court of Limestone County, the judge thereof, in exercising some of the functions imposed upon him, may adopt a seal to authenticate his acts.

3. For certain purposes the Municipal Court of Limestone County is not a "court of record."

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of December 27, 1941, is as follows:

"Kindly furnish me your official opinion on the following points in connection with the Municipal Court of Limestone County, of which I am present Judge:

"1. Does the Judge of said Court have authority to take acknowledgments to deeds, mortgages, etc? As you are doubtless familiar, this Court was created by Local Acts of 1931, pages 167 et seq.

"2. Does the Judge of said Court have the authority to perform marriage ceremonies?

"3. Does said Court have authority to use a seal?

"4. Is said Court a Court of Record?

"For your study of this last question, I might state that the Municipal Court of Limestone County has county-wide jurisdiction territorially, and as to offenses has a dual jurisdiction,—(a) the usual jurisdiction of

justices of the peace, and (b) the jurisdiction of county courts, county courts of course having the same jurisdiction criminally as circuit courts so far as misdemeanors are concerned.

"Further referring to question 4, this court was created to take the place of the old county court of Limestone county, which, of course, was a court of record and also to provide a limited civil jurisdiction and of course preliminary jurisdiction of felonies.

"In fact, the act creating the Municipal Court of Limestone County (Local Acts of 1931, pages 167 et seq.) and the act abolishing the old county court of Limestone County were companion bills, being introduced about the same time, I believe the records will show; the act abolishing the county court is found in Local Acts of 1931, page 131. Since the county court was a court of record, and this court was created to take its jurisdiction, I am puzzled as to whether it too is a court of record, and would appreciate your study and opinion in the matter."

In my opinion, your first inquiry must be answered in the affirmative.

Section 2 of Act No. 362, S. 423, approved July 6, 1931, (Local Acts of 1931, page 167) provides:

"Section 2.—Said court and the judge thereof shall have and exercise all of the jurisdiction, power and authority, and shall perform all the duties which are now or may hereafter be conferred or required by the general laws of the State of Alabama, on justices of the peace and justice courts,—the territorial limits of said jurisdiction to be co-extensive with the limits and boundaries of Limestone County, Alabama, and the subject matter of said jurisdiction to be the same as now, or hereafter, given by law to justices of the peace in the State of Alabama."

Code 1940, Title 47, Section 25, provides:

"§25. Officers authorized to take acknowledgments, etc., in this state.—Acknowledgments and proofs of conveyances may be taken by the following officers within this state: Judges of the supreme court, the court of appeals and circuit courts, and the clerks of such courts; registers of the circuit court, judges of the court of probate, justices of the peace, and notaries public."

In the case of *Lucas v. Boyd*, 156 Ala. 427, 47 So. 209, the Supreme Court upheld the right of a mayor, upon whom the legislative charter of the city of which he was the chief executive officer had conferred the rights, powers and authority of a justice of the peace, to take and certify such an acknowledgment.

By analogy, the code section, cited *supra*, authorizing justices of the peace to take acknowledgments, considered in connection with the Local Act, *supra*, is authority for the Judge of the Municipal Court of Limestone County to take such acknowledgments.

For the same reasons, your second inquiry must be answered in the affirmative.

Code of Alabama, 1940, Title 34, Section 6, authorizes justices of the peace to solemnize marriage ceremonies. Section 2 of the Local Act, supra, when considered in relation to that power resting in justices of the peace, authorizes the Judge of the Municipal Court of Limestone County to solemnize such ceremonies.

Inasmuch as the Legislature has not provided for the Municipal Court of Limestone County to have an official seal, your third inquiry must be answered in the negative. This does not prevent the judge of the court, of whom Section 2, supra, confers the rights, powers and authority of a justice of the peace, from adopting a seal to authenticate his official acts in the exercise of such power and authority. Cf. *Goree v. Wadsworth*, 91 Ala. 416, 8 So. 712.

Your fourth inquiry is difficult of an accurate answer, for the reason that, under certain circumstances, a court may be considered a "court of record" for certain purposes, and not be considered such a "court of record" for other purposes. See *Cook, County Treasurer v. Burke, Judge*, 177 Ala. 155, 58 So. 984; *State ex rel Vandiver v. Burke, Judge*, 175 Ala. 561, 57 So. 870. Cf. *Willett v. Weaver*, 205 Ala. 268, 87 So. 601; *Aetna Auto Finance, Inc. v. Kirby*, 240 Ala. 288, 198 So. 356.

Not being advised of the exact connotation of the phrase "court of record" as employed in your inquiry, I shall undertake no categorical answer. However, you are respectfully referred to Quarterly Report, Attorney General, Vol. III, page 15, in which the conclusion was announced that the Civil and Criminal Court of Autauga County, a court constituted substantially similar to the Municipal Court of Limestone County, was not a court of record.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 20, 1942

Hon. T. N. Washam,
Tax Assessor,
Talladega County,
Talladega, Alabama.

Taxation—United States—Eminent Domain—

In condemnation proceedings instituted by the Federal Government for war emergency purposes by virtue of Section 171, U. S. C. A. in the Federal District Court, the title to the said property passes to the Federal Government upon the filing of a declaration of taking and the depositing into the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration under Section 258-a of Title 40 of U. S. C. A. When a decree on the declaration of taking is entered prior to October 1, 1941, the property affected thereby is not assessable for ad valorem taxa-

tion as of October 1, 1941, for taxes payable as of October 1, 1942, as title to the property passed to the Federal Government prior to October 1, 1941.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of November 7, 1941, in which you request an official opinion, is as follows:

"In a number of instances in Talladega County, Alabama certain lands have been condemned by the United States of America and possession taken under a decree on declaration of taking, apparently vesting title in the United States. The majority of the condemnation proceedings with declaration of taking were filed prior to October 1, 1941 and possession was delivered to the government prior to October 1, 1941. A copy of the decree, which on its face, vests title in the United States, is attached for your information.

"I should like to have your official opinion as to whether this decree, together with possession by the government prior to October 1, 1941, is sufficient to vest title in the United States and exempt the property from assessment and taxation for the tax year 1941-42, viz.:, for taxes assessable as of October 1, 1941 and payable October 1, 1942.

"In some instances the United States has optioned land in Talladega County, Alabama, the option being accepted by the United States and possession delivered by the vendor to the United States, the entire transaction taking place prior to October 1, 1941. In your opinion of October 21, you advised me that in those instances where an executory contract, binding on both the government and the individual, existed and where the government has possession of the land prior to October 1, 1941, that a lien for 1941-42 taxes did not exist, the property being exempt from assessment and taxation.

"It has come to my attention that in some instances where the above circumstances existed the government has deemed it necessary to condemn the said land by instituting the necessary condemnation proceedings, together with a declaration of taking, in order to cure title defects which existed and which apparently could not be cured in any other manner. I should therefore like to have your official opinion as to whether in those cases where an executory contract of sale exists between the vendor and the United States and where possession has been delivered to the United States upon acceptance by the United States of the option to buy, all this prior to October 1, 1941, but where due to title difficulty or for other reasons, the government deems it necessary to institute condemnation proceedings together with a declaration of taking which on its face vests title absolutely in the United States, such decree on declaration of taking being obtained subsequent to October 1, 1941, the lien for taxes for the tax year 1941-42 attaches to the property or whether such property is exempt from assessment and taxation."

In answer to your first inquiry, it is my opinion that the property covered in the situations therein presented is not assessable for ad valorem taxation as of October 1, 1941, for taxes payable as of October 1, 1942.

There were decrees on declarations of taking entered prior to October 1, 1941. You enclose a form copy of a decree on the declaration of taking which contains the following proviso:

"NOW THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the title to the said land in fee simple absolute vested in the United States of America upon the filing of the said declaration of taking and the depositing in the registry of this Court of the amount of estimated just compensation, which land is situated in the County of Talladega, Alabama, and is described as follows:"

It appears that the condemnation proceedings were instituted under the authority of Section 171 of Title 50 of the U. S. C. A. This section provides that the Secretary of War may cause proceedings to be instituted in the name of the United States for emergency war purposes and that immediate possession may be given to the Federal Government. The proceedings were brought in the Federal District Court and declarations of taking were filed as to five parcels of the 33,000 acres in accordance with Section 258-a of Title 40, U. S. C. A. Said section provides for the filing of the declaration of taking and specifically provides when the title to the land sought to be condemned passes to the United States of America. Subsection (5) of Section 258-a provides in pertinent part as follows:

"5. * * * Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage. * * * " (Emphasis supplied)

The two above-cited provisions of U. S. C. A. were construed in the case of **United State v. 72 Acres of Land, etc.**, D. C., 37 F. Supp. 297, by the Federal District Court of California, and the constitutionality of same were upheld. In regard to the title of the lands sought to be condemned, the court, in its opinion, observed as follows:

"The title which vests upon the filing of the declaration and the making of the deposit is lacking practical effect until some muniment of title is provided. It is usual and common practice for the court to enter

judgment on the declaration of taking and such judgments are not subject to attack as unauthorized or in excess of jurisdiction. *United States v. Eighty Acres of Land*, supra; *Hessel v. Smith & Co.*, D. C., 15 F. Supp. 953. Compare *United States v. Meyer*, supra."

The former decisions of the Federal District Courts in regard to when title passes to the Federal Government in such condemnation proceedings are not applicable to the instant case in view of the specific statutory authority hereinabove referred to. Cf. *Hessel v. Smith & Co.*, D. C., 15 F. Supp. 953; *United States v. Forbes*, D. C., 259 F. 585, affirmed C. C. A. 268 F. 273; *In re: Trading Camp in Prentice County, Va.*, D. C. 260 F. 986.

The question as to when title passes to the Federal Government is of paramount importance in determining the matter of your inquiry in view of the fact that October 1 of any year is the tax date that determined the liability of persons and property for ad valorem taxation. The property is assessable by the taxable owner thereof and the tax lien attaches as of October 1 of one year and the tax is payable as of October 1 of the succeeding year. *United States v. Alabama*, (U. S. Sup. Ct.) 85 L. ed. 896; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527; Quarterly Report of Attorney General, Vol. VII, page 237.

Applying this rule to the instant case, it must be determined as to whether title to the property in question for taxation purposes passed to the Federal Government before October 1, 1941. If it did, the property is not subject to taxation for those taxes payable as of October 1, 1942. If it did not, the property is subject to taxation October 1, 1941, for the taxes payable October 1, 1942.

In view of the specific statutory provisions of Section 258-a, supra, above-quoted in part, and the citation of authorities construing said provisions, it follows that the title passed to the Federal Government upon the filing of the declarations of taking and of the deposit in the court to the use of the persons entitled thereto of the amount of estimated compensation stated in said declaration.

It, therefore, follows in regard to the situations presented in your first inquiry that title passed to the Federal Government as of the dates of said decrees, which were before October 1, 1941. Therefore, said property is not subject to assessment by the former owners thereof, as of October 1, 1941, and is not subject to taxes due as of October 1, 1942. (Code 1940, Title 51, Section 2)

In answer to your second inquiry, it is my opinion that the ruling of this office made to you under date of October 21, 1941, holding that property in possession of the Federal Government on October 1, 1941, under an executory contract of purchase wherein the Federal Government is the purchaser, is not subject to ad valorem taxation for the tax year 1941-42, is not affected by the fact that condemnation proceedings are entered for the purpose of clearing title and decrees on declarations of taking are not obtained until subsequent to October 1, 1941.

The correctness of the opinion to you under date of October 21, 1941, is being questioned and in all probability the matter will have to be determined by the Courts. However, in the meantime, you will be protected in following said opinion and also this opinion. (Code 1940, Title 55, Section 241.)

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 26, 1942

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Poll Tax—Militia—Alabama State (Home) Guard—

Members of the Alabama State (Home) Guard are not entitled to exemption from the payment of poll tax by reason of such membership.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of January 15, 1942, is as follows:

"The question has been raised in this County as to whether the members of the Alabama Home Guard will be entitled to the exemption from Poll Tax allowed to members of the Alabama National Guard. The contention is that they take the place of the National Guard and are entitled to all of its privileges.

"I am unable to find any ruling from your office on the question. If you have rendered one will you kindly send me a copy of it and if not will you kindly give me one."

In my opinion, the question presented by your letter of inquiry should be answered in the negative, i. e., members of the Alabama State (Home) Guard are not entitled to exemption from payment of poll tax by reason of such membership.

The exemption of active officers and enlisted members of the Alabama National Guard and Naval Militia from poll tax is afforded by the Code of Alabama, 1940, Title 35, Section 11, which reads, in pertinent part:

"§11. Exemption from poll tax, street tax and jury duty.—Owing to liability to call for military duty during their term of service, **every officer and enlisted man of the national guard and naval militia of Alabama, shall be exempt from poll tax, * * *** during his active membership, any local or special laws to the contrary notwithstanding; provided that every person who shall have served an aggregate of twenty one years in the active national guard or naval militia of Alabama shall be thereafter forever exempt from poll tax, * * * by reason of such service, any other laws to the contrary notwithstanding. * * * " (Emphasis supplied)

To the same effect is Code of Alabama, 1940, Title 51, Section 238.

From the above-quoted excerpt and especially the emphasized portion thereof, it can be seen that this exemption from poll tax is afforded only to "every officers and enlisted man of the **national guard and naval militia of Alabama.**"

The Alabama State (Home) Guard is only a temporary military force, organized by the Governor pursuant to the provisions of Code of Alabama, 1940, Title 35, Section 8, due to the fact that the National Guard of Alabama has been called, drafted or ordered into the service of the United States. This section reads as follows:

"§8. Temporary military force.—In the event of all or part of the national guard of Alabama being called, drafted or ordered into the service of the United States, **the governor is hereby authorized to organize, equip, train and maintain,** only during periods when the national guard of Alabama is in the federal service, **at such strength and in such organizations and branches of the service as he may deem advisable, a temporary military force similar to the national guard and organized for the same state purposes, and, if authorized by federal laws, shall be organized, maintained and trained under the provisions of the national defense act now or hereafter enacted for the organization, maintenance and training of the national guard; Provided, that such organization shall be disbanded and discharged from the service of the state on release or discharge of the national guard of Alabama from the federal service and return to its national guard status; And, provided further, that no person shall be commissioned or enlisted in the organization provided for in this section unless he is among those who are classed as eligible for, or capable of, limited military service only under a federal selective service or similar act because of physical disability or other disqualifying conditions.**" (Emphasis supplied)

From a reading of this section, and especially the emphasized portions thereof, it can be seen that, while the Alabama State (Home) Guard is similar to the National Guard and organized for the same State purposes, it is only a temporary military force to serve during the period that the National Guard of Alabama is in the service of the United States and that it must be disbanded and discharged from the service of the State of Alabama on the release or discharge of the National Guard of Alabama from the federal service and return to its National Guard status.

Under the well-known rule of statutory construction that exemptions from taxation must be strictly construed in favor of the taxing authority and

against the person claiming the exemption, I am constrained to hold that members of the Alabama State (Home) Guard are not entitled to exemption from payment of poll tax by reason of such membership.

Of course, if a member of the Alabama State (Home) Guard was entitled to exemption from the payment of poll tax before he became such a member, by reason of some exemption status, the fact that he is a member of the Alabama State (Home) Guard would not operate to deny him such exemption.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 26, 1942

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Code 1940, Title 10, §150—Code 1923, §§7190-7192—Alabama Relocation Corporation—Deed Filing Tax—Tax Exemptions—

Alabama Relocation Corporation formed under Code 1923, §§ 7190-7192 (Code 1940, Title 10, § 150) not exempt from payment of deed filing tax imposed by Code 1940, Title 51 § 618, upon deeds offered by it for record.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion, bearing date of January 16, 1942, is as follows:

"From time to time there has been offered for record in this office, deeds payable to the Alabama Relocation Corporation. It is my understanding that other deeds will be offered for record in this and other counties in the State. The Farm Security Administration appears to have some connection with this Corporation as the local representatives of the FSA offer the deeds for record. It is their contention that the Alabama Relocation Corporation is a State agency and as such is exempt from payment of deed filing tax. Recently I made inquiry of the County Tax Assessor and learned that the lands that this Corporation have acquired are being assessed for State and County ad valorem taxes. This fact has produced doubt in my mind as to whether deeds conveying titles to this organization are taxable when filed for record.

"Please give me your official opinion on this question."

I find that the Alabama Relocation Corporation was organized under Code 1923, §§ 7190-7192, according to a certificate filed December 27, 1940, in the office of the Judge of Probate of Montgomery County and of record therein in Corporation Records, Book 14 at page 471.

Code 1923, § 7190 authorizes organization of corporations "to promote the development or betterment of communities, municipalities or counties in this state, or for the promotion of other public purposes, without pecuniary profit to the individual members."

Section 7192 of said Code purports to exempt the property of such corporations from "all State, County and municipal taxation and licenses," but further provides that "if used for any other purpose than legitimately pertains to the object of such society, it shall not be so exempt."

Said Section 7192, however, was radically revised in the Code of 1940, wherein as Title 10, § 150, Sections 7190 and 7191 of the Code of 1923 now appear without change, said Section 7192, supra, now appears in the Code of 1940 as Title 51, Section 12.

I am of the opinion, therefore, that whatever exemption from taxation such corporations may have enjoyed prior to May 31, 1941, when the Code of 1940 became effective, has now been withdrawn. **Quarterly Report, Attorney General Vol. XXIII p. 170.**

I find nothing in the statute authorizing formation of such corporations to warrant the inference that they are State agencies and therefore exempt on that ground from payment of the deed filing tax, whatever connection they may have with the Farm Security Administration.

It is well settled that exemption from taxation, in whatever form, must be based on express, positive and unambiguous constitutional or statutory provision to that effect. I am unable to find such provision with reference to corporations formed under Code 1923, §§ 7190-7192 as amended and carried into the Code of 1940, as Title 10, § 150.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 26, 1942

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Coal Dealers—Licenses—

Merchants who operate grocery stores and in connection therewith sell coal in small quantities, nothing larger than a crocus sack,

are not liable for license under Sections 488 or 489, Title 51, Code 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of January 15, 1942, is as follows:

"At the request of the License Inspector I am asking an opinion to clarify what constitutes a small coal dealer.

"There are a number of small merchants in this County who operate grocery stores and in connection with their grocery stores they sell coal in small quantities, nothing larger than a croker sack. These people have not been required to pay a regular coal dealers' license for the reason that they purchased their coal from a regular coal yard in the City in quantities of from one to five tons and they re-sell the coal in sacks and they do not maintain adequate wagon or truck scales.

"The License Inspector has cited one or more of these small dealers under Schedule 488, Title 51. The State Revenue Department holds that they are not due a license under Schedule 488, but are due a license under Schedule 489.

"This office is of the opinion that under Schedule 488 it was the intention of the Legislature where a small dealer did not have an adequate wagon or truck scale but sold coal in less than one-half ton lots that he was not subject to a license, but we do note that they use the words 'whose inventories and sales are in quantities of less than one-half ton' but at the same time, at the beginning of Schedule 488 they specifically state that it must be an established yard with adequate wagon or truck scales. Neither can we reconcile the fact that this small dealer would be licensed under Section 489.

"Would like to get this matter cleared up as several citations are outstanding."

In answer to the above request, you are advised that in my opinion the merchants mentioned therein are not liable for a license either under the provisions of Section 488 or under the provisions of Section 489, Title 51, Code of Alabama, 1940.

Section 488, supra, is as follows:

"§488. Coal and coke dealers maintaining yards.—Each person dealing in coal or coke and maintaining one or more established yards, with adequate wagon or truck scales, from which yard or any yard of an established dealer, all retail deliveries are loaded, in cities or towns of five thousand inhabitants or less, whether incorporated or not, five dollars; in cities of more than five thousand and not more than twenty thousand inhabitants, ten dollars; in cities of more than twenty thousand inhabi-

tants, twenty dollars for each yard. This section and the succeeding section shall not apply to persons whose inventory and sales are in quantities of less than one-half ton. Each such person shall, within thirty days after the approval of this title and annually thereafter at the time of paying for and procuring his dealers license, register with the officer in the county collecting and issuing licenses the number of trucks to be operated from his one or more yards and shall at the time of such registration pay a fee of one dollar per truck for each truck so used, and shall procure a tag for each truck, showing the year for which it issued, the registration number, and the term 'coal-coke dealer or hauler,' and the abbreviation of Alabama, and such tag shall at all times be conspicuously displayed next to the regular license tag on all trucks engaged in this business. The dimensions of this tag shall be not less than four inches by eight inches, and it shall be of a color different from the then current license tag. The registration fee herein provided shall be in addition to the regular motor vehicle license fee."

It is my opinion that upon a reading of this entire section, before a person would be liable for a license under the provisions thereof, such person must maintain an established coal yard with adequate wagon and truck scales. The merchants mentioned in your request do not maintain established coal yards where there are adequate wagon and truck scales, and therefore, in my opinion, these merchants do not come within the purview of this section.

Section 489, supra, reads as follows:

"§ 489. Coal and coke dealers not maintaining yards.—Each person, other than those qualifying under Section 488 of this title, engaged in selling, distributing, or hauling or delivering coal or coke by truck or other vehicle, whether as dealer, employee, agent, broker, sales agent or mining company who sells, or hauls or delivers direct from mine or plant to consumer shall pay a privilege license on the first truck or other vehicle used in said business of fifteen dollars, and on each additional truck or vehicle three dollars, but the provisions of this section shall not apply to persons whose inventory and sales are in quantities of not more than one ton, and in no event shall this license be issued for less than one year, such license to be in addition to the regular motor vehicle license. Each such person shall register each truck or other vehicle so used in such business in the county in the office collecting and issuing license. When such trucks are registered and all license requirements complied with, a tag as above described shall be issued for each truck or other vehicle, and such tag shall at all times be displayed next to the regular license tag on all trucks or other vehicle in such business."

It will be noted that the basis of the license imposed by this section is the number of trucks operated by coal dealers in delivering coal or coke. The merchants mentioned in your request for opinion do not operate any trucks whatsoever, and therefore there would be no basis of measuring a license against these persons. You are therefore advised that in my opinion the merchants mentioned in your letter are not within the purview of Section 489, supra.

Cf. —Biennial report of Attorney General, 1934-36, p. 736.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 26, 1942

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—Plate Glass—"Principal business"—Words and Phrases—

A concern whose principal business is the selling of plate glass or other glass within the meaning of Section 532, Title 51, Code of 1940, is liable for the license thereby imposed.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of January 16, 1942, is as follows:

"The Pittsburgh Plate Glass Company operates a store in Montgomery, engaging in the business of selling glass and paint, and products kindred to paint such as paint oil, paint brushes and wallpaper. From September 1, 1939 through August 31, 1940 the selling of glass constituted 26.9% of its total business, while the sale of paint and kindred products constituted 73.1%. From September 1, 1940 through August 31, 1941, 38.6% of its business was selling glass while 61.4% was selling paint and kindred products. The sale of paint alone constituted substantially more than 50% of the business each year. More than ten times as much was spent each of said years in advertising paint as was spent advertising glass.

"Title 51, Section 532 of the Code of Alabama requires a license of 'each person whose principal business is the selling of plate glass, or other glass.' Upon failure to secure this license either of the years mentioned above, this corporation was cited by the County License Inspector, and thereupon secured a state and county license for each of said years, paying also, the penalties and fees assessed. The 1941 license was issued November 1, 1940, while the 1942 license was issued November 4, 1941.

"This corporation has now filed a petition in this Court for a refund of the amount paid for said license for each of said two years, together with penalties paid, less Probate Judge's commissions. Said petition is filed under the provisions of Title 51, Sections 848 and 849 of the Code of Alabama.

"Based on these facts, I will appreciate your official opinion as to whether the petitioner is entitled, under the law governing such proceedings, to a re-fund of said funds thus paid, or any part thereof."

In answer to the above inquiry, you are advised that in my opinion the Pittsburgh Plate Glass Company is not entitled, under the law governing

such proceedings, to a refund of the license paid for the years 1941 and 1942.

The answer to your question necessarily involves an interpretation of the words "principal business" as used in Section 532, Title 51, Code of 1940.

In this regard, your attention is called to the case of **Equitable Building and Loan Association v. State**, 232 Ala. 574, 168, So. 695, wherein the Supreme Court of this state, in interpreting the meaning of "principal business," made the following observation:

"The expression 'whose principal business is lending money,' as found in schedule 70, § 361, Gen. Acts 1919, pp 395, 419, is a mere matter of classification, and nothing more. Defendant comes within this classification by its very charter powers and the purpose of its creation, as decided in the foregoing authority. The loans made from year to year show a continuance in business. What business? The business of a loan association, of course, and the principal business of a loan association is the lending of money. The number and amount of loans are, therefore, in our minds, wholly immaterial (*Nashville, C. & St. L. Ry. Co. v. Alabama City*, 134 Ala. 414, 32 So. 731), and we think it logically follows that the trial court correctly ruled in holding the defendant liable for the license."

It is a well known fact, and a fact which you, as Probate Judge, judicially know, that the Pittsburgh Plate Glass Company is one of the largest sellers of plate glass or other glass in the United States, and perhaps is the largest seller of this product in the State of Alabama.

Paraphrasing the above quotation from the *Equitable Building and Loan Association* case, the business of a plate glass company, of course, and the principal business is the selling of plate glass and other glass. As pointed out in this case, the amount of glass sold in relation to other products is wholly immaterial. Therefore, applying the above test to the meaning of the words "principal business," in my opinion, the principal business of the Pittsburgh Plate Glass Company is the selling of plate glass and other glass, and such company is accordingly liable for the license imposed by Section 532, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 26, 1942

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Judge of Probate—Motor Vehicles—Licenses—Refunds—

Where a resident of one county in Alabama purchases his motor vehicle license in another county in Alabama, the judge of probate of the county in which such license was purchased does not have the legal authority, upon timely application for a refund, to grant to the taxpayer such a certificate as will enable him to secure from the county a refund of the amount of such license which the county received, and from the State the amount of such license which the State received.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of November 18, 1941, is as follows:

"In 1941 there were several citizens of Leeds, Jefferson County, Alabama who bought their automobile tags in St. Clair County. These people were cited by the County License Inspector of Jefferson County, as I understand, and were made to purchase 1941 tags for the same cars in Jefferson County.

"These people have filed claims against St. Clair County for refunds on the tags bought in St. Clair County, having returned the old tags which they had bought in St. Clair County.

"Will you please advise if St. Clair County can legally refund, from the General Fund, the percent of the purchase price of said tags which the County received?"

I assume that the citizens referred to in your letter of inquiry are residents of Leeds, Jefferson County, Alabama.

This office has ruled that residence, rather than citizenship, determines the county in which the license on a motor vehicle owned by an individual should be taken out, and that an individual must secure his motor vehicle license in the county of his residence. See opinion of the Attorney General to Hon. I. R. Reddoch, Judge of Probate, Crenshaw County, Luverne, Alabama, under date of November 15, 1933, Biennial Report of Attorney General, 1932-34, page 428. While that opinion contrued the then applicable law, Code of Alabama, 1940, Title 51, Section 704 is substantially the same in legal effect, so far as this question is concerned. Therefore, the citizens (residents) of Leeds, Jefferson County, Alabama, who bought their motor vehicle licenses in St. Clair County, Alabama improperly purchased the same in St. Clair County.

Section 704, *supra*, provides that, before a motor vehicle license is issued for a motor vehicle owned by an individual, the ad valorem tax on such vehicle for the preceding year shall have been paid in the county in which the owner of such vehicle resides, as evidenced by a receipt of the tax collector. An individual desiring to secure a motor vehicle license for his motor vehicle must first return such motor vehicle for ad valorem taxation for the preced-

ing year to the tax assessor in the county in which he resides, and the tax assessor shall deliver to the person making the return a certificate of assessment on a form prescribed by the Department of Revenue, and such certificate is the warrant of the tax collector to collect the tax as shown thereon. He must then pay the tax due, if any, to the tax collector, for which he receives the tax collector's receipt. Then, in purchasing his motor vehicle license from the judge of probate, he must surrender the receipt of the tax collector to the judge of probate, and the judge of probate shall keep the same on file in his office. The license tag which he secures from the judge of probate is evidence of the payment of the ad valorem tax due on the motor vehicle, as well as the payment of the license for the same. If there is no ad valorem tax due upon the motor vehicle for the preceding year, the certificate of the tax assessor certifying to that fact, rather than the receipt of the tax collector for the ad valorem tax, is the authority of the judge of probate for the issuance of the motor vehicle license.

It is a well known principle of law that a person cannot secure a refund of monies voluntarily paid to the State unless the Legislature, as a matter of grace, has given statutory authority to seek a refund. Cf. **First National Bank of Scottsboro v. Jackson County**, 227 Ala. 448, 150 So. 690; **Lee v. Cunningham**, 27 Ala. App. 461, 176 So. 475, Cert. Granted 234 Ala. 639, 176 So. 477. See opinion to Hon. Chester Walker, Judge of Probate, Tuscaloosa County, Tuscaloosa, Alabama, under date of October 5, 1939, Quarterly Report, Attorney General, Vol. XVII, page 30. Therefore, if the several citizens in question are entitled to a refund of the money paid for such licenses, there must be specific statutory authority therefor.

Code of Alabama, 1940, Title 51, Sections 848 and 849, provide a method whereby a person who, through a mistake or error on the part of the judge of probate, has paid to the judge of probate money that was not due from him for a license may secure a refund of the amount so paid for such license. Section 848 reads as follows:

"§848. Relief from mistake in payment of tax.—Any person who **through a mistake or error on the part of the judge of probate** has paid to the judge of probate money that was not due from him for such license, or **by such mistake** has paid to the judge of probate for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded, less commission retained by probate judge, to him the amount in either event so **erroneously collected by the judge of probate**, and the provisions of this section shall apply only to cases when application for refund is made within two years from date such license is alleged erroneously to have been paid." (Emphasis supplied.)

From the emphasized portion of Section 848, *supra*, it can be seen that these section only provide a method whereby a person who, **through a mistake or error on the part of the judge of probate**, has paid to the judge of probate money that was not due from him for a license, may secure a refund of the amount so paid for such license.

From a review of the procedure to be followed in purchasing a motor vehicle license, which is outlined above, it appears that the money which these

citizens (residents) of Leeds, Jefferson County, Alabama, paid to you, as Judge of Probate of St. Clair County, Alabama, for motor vehicle licenses was not paid to you through any mistake or error whatsoever on your part, as Judge of Probate of St. Clair County, Alabama, but rather that it was paid to you through a mistake or error on their part.

The premises considered, you are advised that you are without legal authority, upon timely application from them for a refund, to grant to them such a certificate as will entitle them to a refund from either the county or the State.

This conclusion is strengthened when similar statutory provisions are considered. Code of Alabama, 1940, Title 51, Section 328, provides a method for the refund of ad valorem taxes paid by any taxpayer "through any mistake, or by reason of any double assessment, or by any error, in the assessment or collection of taxes, or other error". Code of Alabama, 1940, Title 51, Section 410 provides a method for the refund of income tax which a taxpayer has paid "through mistake or error". Code of Alabama, 1940, Title 51, Section 913 provides a method for the refund of taxes or licenses which are paid directly to the Department of Revenue where the taxpayer has paid such taxes or licenses "by a mistake of fact or law". Thus, it can be seen that under these statutory provisions a refund can be secured when the payment was made through any mistake or error, including a mistake or error on the part of the taxpayer, but, as above stated, the Legislature has seen fit to provide a method for the refund of money paid to the judge of probate for a license only when the money was paid "through a mistake or error on the part of the judge of probate".

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 26, 1942

Hon. Asa Young, Clerk,
Circuit Court, Talladega County,
Talladega, Alabama.

Costs and Fees—Clerks of Circuit Court—Sheriffs—

1. The Clerk of the Circuit Court or other court of like jurisdiction is entitled to \$1.25 for issuing each summons and complaint as to each defendant. This rule applies to branch summonses.
2. The Sheriff of a county is entitled to \$1.50 for serving any summons and complaint, but where the summons and complaint is returned "not found," the sheriff would not be entitled to his fee.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of January 16, 1942, in which you request an official opinion, is as follows:

"In my official capacity as Clerk I respectfully request an opinion as to the following questions relating to the fees I am entitled to charge in civil cases. This office is on a fee basis.

"(1) When a suit is filed and several defendants are named in the Summons and Complaint, one or more of whom reside out of the county and one or more of whom reside in the county, the attorney filing suit generally furnishes me with the number of copies necessary. Am I entitled to charge costs in case under Sec. 21, Title 11 and other Sections of the Code of Alabama of 1940, \$1.25 for each Summons and Complaint as to each defendant or am I entitled to charge for only one Summons and Complaint and an additional amount of 30c for each copy?

"(2) Under Title 7, Section 185, does the issuance of a Summons and Complaint as to each Defendant residing out of the county constitute a Branch Summons and Complaint, and as such entitle me to \$1.25 for each of same under the first above statute referred to?

"(3) When the Sheriff fails to serve several defendants, returning the process with notation 'No such person found,' should I enter a cost in case in amount of \$1.50 for serving such Summons and Complaint, making such return under Sec. 34, Title 11, of the Code of Alabama or any other Statute of this state?

"Please outline to me just what cost I should charge in cases involving the above situations."

In answer to your first inquiry, it is my opinion that you are entitled to a fee of \$1.25 for issuing each summons and complaint as to each defendant. Code 1940, Title 11, Section 21, provides in pertinent part as follows:

"21. Fees allowed to clerks of circuit courts.—Clerks of circuit courts are entitled to receive the following fees for the following services:

"Issuing summons and complaint \$1.25"

The above, in my opinion, is applicable to each summons and complaint issued by you as to each defendant, although copies may be furnished you by the attorneys.—Quarterly Report of Attorney General, Volume XIII, page 68.

My answer to your second inquiry is in the affirmative. The issuance of a branch summons and complaint is, nevertheless, the issuing of a summons and complaint and I see no reason why the clerk would not be entitled to a fee of \$1.25 provided for issuing summons and complaint, as provided for by Title 11, Section 21, supra. Of course, you must mark the summons and complaint so as to designate it as a branch summons, as suggested in the case of **Drennen & Co. v. Jasper Improvement Company**, 153 Ala. 322, 45 So. 157.

My answer to your third inquiry is in the negative. I call your attention to Title 11, Section 34, which has to do with sheriff's fees and commission, where it says:

"Serving any summons not herein provided for and making return
\$1.50"

This item contemplates service and if there is no service and the process is returned "not found," this item does not apply.—Cf. *Northern Alabama Railway Co. v. Lowery*, 3 Ala. App. 511, 57 So. 260.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 26, 1942

Hon. M. T. Maxwell, Secretary,
Tuscaloosa County Board of Revenue,
Tuscaloosa, Alabama.

Counties—Postage—Officers—

A county may, by proper resolution establish a central mailing office for all county officers, bureaus and departments to which the county is required to furnish postage, and may use unit meter stamping machines for mailing purposes.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of January 16, 1942, in which you request an official opinion, is as follows:

"At present time all departments of the county including the Board of Education are furnished stamps through requisition on the Purchasing Agent. We have felt for some time that a stamping machine, something similar to that used by the State on a small scale, would result in a saving to the county. We would like, therefore, to ask this question:

"Can the Board of Revenue, by resolution, set up a central mailing room and legally enforce it and discontinue the method now used?"

It is my opinion that by proper resolution made and passed by your Board of Revenue or other like governing body, your county may establish a central mailing office for all county officials, bureaus and departments to which the county is required to furnish postage, and may use unit meter stamping ma-

chines for mailing purposes. Under the law your county is required to furnish certain county officers postage for purely official business and no other, the method suggested by you, when put in force, is simply furnishing this postage through a different system of mailing. The use of the meter stamping machine or machines is a method of showing that the postage has been paid and, in my opinion, such a system is within your power and right.

I am enclosing a blank application furnished by the Postal Authorities, applying for this service, together with the conditions governing the acceptance of metered mail, which you may find helpful in getting your set-up perfected.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 26, 1942.

Hon. Earl Adams,
Probation Officer,
Board of Pardons and Paroles,
Capitol.

Probation—Revocation—Necessity of presence of probationer at hearing and of opportunity to be heard—

1. Under Section 24, Title 42, Chapter 2, Code of 1940, probationer must be present at proceedings for revocation of probation, and must be given an opportunity to be heard.

2. Absconding probationer, whose probation is subsequently revoked, is not entitled to credit upon his sentence for any time which he was a fugitive from justice.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your request for official opinion bearing date of January 14, 1942, is as follows:

"Please give me an opinion on the following two questions:

"1. Section 24 of Probation Act states: 'Thereupon the court, after a hearing, may revoke the probation or suspension of execution of sentence ' Can the court revoke probation without the probationer being

present for a hearing when probationer has fled the jurisdiction of this court, or is being held in jail in another county after confessing his guilt in another case?

"2. In the event an order of revocation is made, does probationer, by any chance, get credit on the sentence while probationer is still a fugitive?"

By your first question, I assume that you pose the inquiry whether or not a court which has granted probation may hold a hearing for the purpose of revoking probation without the probationer being present in court and without affording him an opportunity to be heard. Of course, if a probationer has fled to another state and thereby becomes a fugitive from justice, he cannot, by reason of his own wrongdoing, gain an advantage by remaining a fugitive until after the term of his probation has expired, and thereafter claim that the court is without jurisdiction to revoke his probation. In such case, the issuance of a warrant for his arrest for violation of condition of probation, or the filing of the report provided by the statute, of the probation officer with the court setting forth the manner in which the probationer has violated his probation, is sufficient to toll the running of the period of probation as fixed by the court in the original order granting the same. Cf. *People v. Hodges*, 231 Mich. 656, 204 N. W. 801; *Pelley v. Colpoys, etc.*, 122 F. (2d) 12.

However, in my opinion, the court which undertakes to initiate proceeding for the revocation of probation of one who is a fugitive from justice is without authority to order revocation thereof in the absence of the probationer and without affording him a reasonable opportunity to be heard. *Escoe v. Zerbst*, 295 U. S. 490, 79 L. ed. 1566, 55 S. Ct. 818; Quarterly Report, Attorney General, Vol. XVIII, page 16; Quarterly Report, Attorney General, Vol. XXIII, pages 46, 53. Cf. *Fleenor v. Hammond, etc.*, 116 F. (2d) 982, 132 A. L. R. 1241. The A. L. R. annotation appended to the last cited case fully and completely collates the decisions of the several jurisdictions upon the question.

In connection with the extradition of a probationer who has become a fugitive from justice by fleeing to another state, your attention is directed to the recent case of *Pelley v. Colpoys*, cited supra, in which application was made for the delivery of an absconding probationer who had violated the conditions of his probation and who had fled to another jurisdiction, **in order that his probation might be revoked**, and that he might be required to serve the sentence imposed upon him in connection with which probation was granted. In that case, extradition was granted, although the court of the demanding state which sought to revoke the convict's probation had entered no order of revocation therein, but sought the extradition for the purpose of holding a probation hearing and entering an order of revocation, as a prerequisite to entering judgment requiring the convict to serve the sentence theretofore imposed upon him.

The Alabama Probation Law (Code 1940, Title 42, Chapter 2 (In Section 24 thereof)) provides for a hearing.

In *Escoe v. Zerbst*, supra, the Supreme Court of the United States, in construing a similar provision of the Federal Probation Law, said:

"The probationer, instead of being brought before the court which had imposed the sentence, was taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for a hearing. For this denial of a legal privilege the commitment may not stand.

"In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. **Burns v. United States**, 287 U. S. 216. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. **French v. Edwards**, 13 Wall. 506, 511. The revocation invalid unless the command has been obeyed.

"We find in this statute more than directory words of caution, leaving power unaffected. This is so if we consider the words alone, putting aside for the moment the ends and aims to be achieved. The defendant 'shall' be dealt with in a stated way; it is the language of command, a test significant, though not controlling. **Richbourg Motor Co. v. United States**, 281 U. S. 528, 534. Doubt, however, is dispelled when we pass from the words alone to a view of ends and aims. Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. **Burns v. United States**, *supra*, at pp 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. **Burns v. United States**, *supra*. That much is necessary, or so the Congress must have thought, to protect the individual against malice or oppression. Almost equally it is necessary, if we read aright the thought of Congress for the good of the probation system with all its hopes of social betterment.

* * *

✓ "When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to **habeas corpus** to put an end to the restraint. It is beside the point to argue, as the Government does, that in this case a hearing, if given, is likely to be futile because the judge has made it plain how his discretion will be exercised in that already he has canceled the suspension on the strength of an **ex parte** showing. The **non sequitur** is obvious. The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. **Cf.**

Snyder v. Massachusetts, 291 U. S. 97, 116. Judgment ceases to be judicial if there is condemnation in advance of trial."

See also **Burns v. United States**, 287 U. S. 216, 77 L. ed. 266, 53 S. Ct. 154.

If a probationer who has violated the terms of his probation is within the jurisdiction of the court, that is to say, within the State of Alabama, and is held in jail on another charge of violation of law in a county other than the county in which he was sentenced and in which the court was sitting which granted probation, there appears no reason why he may not be brought before the court which seeks to revoke his probation nor why an opportunity for hearing may not be afforded him.

Your second inquiry has been answered in the negative by an opinion of this office, cited supra, addressed to Hon. Lamar Field and Hon. R. B. Carr, Circuit Judges, Anniston, Alabama, under date of April 8, 1941, Quarterly Report of the Attorney General, Vol. XXIII, page 46. You are respectfully referred to that opinion in answer to the first question therein posed, appearing on pages 47-49.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1942

Hon. Jas. C. Long,
Road Supervisor,
Cherokee County,
Centre, Alabama.

Cherokee County—Local Acts 1939, p. 143—Road Supervisor.—

1. Upon vacancy in the office of Road Supervisor created by Act No. 251, H. 296, approved Aug. 24, 1939 (Local Acts 1939, p. 143) his successor in office should be appointed by the Governor.

2. Said officer holds office at the pleasure of the Governor and has no fixed term of office, and may be removed from office by the Governor at any time with or without cause.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 15, 1942, is as follows:

"Under the provisions of House Bill No. 296, approved August 24, 1939, Section 2, I was appointed County Road Supervisor for Cherokee County by Governor Dixon, for the term expiring the first Tuesday after the second Monday in January, 1943, or until my successor is elected and qualified.

"I have been advised that under the provisions of the above bill that the incoming Governor will not have the authority to appoint the County Road Supervisor for Cherokee County for the term beginning the first Tuesday after the first Monday in January 1943 and that if I desire another term as Road Supervisor that it will be necessary for me to be elected, at the General Election in 1942, by the qualified electors of the entire county.

"Please advise me at your earliest convenience whether or not the County Road Supervisor for Cherokee County, for the term beginning in January 1943, will be appointed by the incoming Governor or elected by the qualified electors of the entire county."

The first and second section of Act No. 251 H. 296, approved August 24, 1939 (Local Acts 1939, page 143) are as follows:

"Section 1. That there is hereby created in and for Cherokee County, Alabama, the office of Road Supervisor.

"Section 2. That said Road Supervisor shall be appointed by the Governor of Alabama immediately upon the approval of this Act, and shall hold office until the first Tuesday after the second Monday in the year 1943, and until his successor is elected and qualified. **That if any vacancy in such office occurs the Governor of Alabama shall immediately appoint a Road Supervisor to fill such vacancy. The Governor shall have the authority to discharge such Road Supervisor with or without cause.**" (Emphasis supplied)

The succeeding sections of this act prescribe the qualifications of such officer, fix within certain limits his salary and expenses of office and in detail state his duties and authority, "subject only to the control of said Board of Revenue of Cherokee County, Alabama, as herein set forth." (Section 10, page 145.)

It will be seen that while providing for appointment of such officer to hold office until "the first Tuesday after the second Monday in the year 1943 and until his successor is elected and qualified," said act is silent as to any provision for selection of a successor thereafter, whether by election or appointment, but does specifically state that "the Governor shall have the authority to discharge such Road Supervisor with or without cause." (Section 2)

The failure, therefore, of this act to provide either the mode or manner of electing or selecting a successor or to fix a term of office for such successor must be regarded as significant.

In *Touart v. State, ex. rel. Callaghan*, 173 Ala. 453, 56 So. 211, the Supreme Court had occasion to consider the effect of an act of the Legislature providing for appointment of a county tax commissioner under Code 1907, Sections 2210-2241. In that case it was said on page 461:

"If the appointing power is given the right to fix the term during which the appointee is to hold office, then, of course, the right of the appointee terminates at the end of the will of the appointing power; **that is**, the appointing power can remove him at pleasure, unless the act or statute authorizing his appointment provides otherwise.

"It is certain that the statute here in question intended that the Governor might appoint and remove county tax commissioners at his pleasure, with or without cause. We think the section in question is incapable of any other construction.

"It has been uniformly ruled that the power to appoint an officer carries with it, as an incident, in the absence of constitutional or statutory restraint, the right to remove the appointee."

On page 463 it was further said:

"It must be observed, however, that this last act while continuing the then incumbents of the offices of county tax commissioners for the term appointed, **did not provide any term of office for their successors, nor fix any definite period for which any of their successors should hold office.** It clearly appears from this act that it was not the intention of the law-makers to fix any definite term for which subsequent appointees should hold office; but that it was intended that, under the new system and at the expiration of the terms of the incumbents, appointees should hold office at the pleasure of the governor and of the State Tax Commission. * * * But when a person is appointed to an office the term of which is not fixed by law, he is then and ever after regarded as holding subject to the will of the appointing power; and this upon the theory that the power of removal is incident to the power of appointment; and when he is removed he is not thereby deprived of any vested right or function, because the very condition of his appointment was that he could be removed at the pleasure of the appointing power." (Emphasis added)

I am of the opinion, therefore, that upon expiration of the so-called term of office of said road supervisor, to-wit: "the first Tuesday after the second Monday in the year 1943," or upon occurrence for any other reason of a vacancy in said alleged office the power of filling the vacancy or appointing a successor is to be exercised by the Governor. This for the obvious reason that no term of office is anywhere within said act definitely fixed for a successor of the first appointee nor for selection of such successor either by the board of revenue or by the people of that county voting at large or otherwise.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 27, 1942.

Mrs. Mary H. Fowler, Superintendent,
State Training School for Girls,
Box 38 East Lake,
Birmingham, Alabama.

State owned automobiles—Federal Use Tax—

Automobiles owned and used by the State or any political subdivision thereof are not liable for the Motor Vehicle Tax imposed by Section 3540 of the Federal Revenue Act of 1941.

Opinion by Assistant Attorney General McQueen.

Dear Madam:

I have your letter of January 23, 1942, in which you request my official opinion, as follows:

"We would like to know if State owned automobiles are exempt from the Federal use tax on motor vehicles."

My answer to your inquiry is in the affirmative.

The Federal Use Tax on motor vehicles referred to by you is imposed under the provisions of Section 3540 of the Federal Revenue Act of 1941, approved September 20, 1941. This section, in pertinent part, is as follows:

"Sec. 3540. Tax on Use of Motor Vehicles and Boats. — (a) Imposition of Tax. — There shall be imposed upon the use of motor vehicles and boats a tax, with respect to each year in which such use occurs at the following rates: (1) Motor vehicles _____ \$5. * * * "

Your attention is called in particular to sub-section (j) of Section 3540, *supra*, which is as follows:

"(j) **Exempt Uses.**— The tax imposed by this section does not apply to the use of a motor vehicle or boat by the United States, a State, Territory, the District of Columbia, or a special political subdivision of any of the foregoing."

It appears from the above quoted sub-section that motor vehicles owned and used by the State of Alabama, or any political sub-division thereof, are not subject to the tax imposed by Section 3540, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 28, 1942.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Probate Court—Jefferson County—Library Tax—Administration of
Estates—Costs and Fees—

1. The library tax imposed by Section 138, Title 62, Code of 1940 is not applicable to the Probate Court of Jefferson County.

2. Costs and fees applicable to the administration of estates in the Probate Court of Jefferson County, Alabama, under the provisions of Act 633, H. 1054, approved July 10, 1940, Gen. Acts, 1939, page 1000, discussed.

3. Under the provisions of Section 29, Title 11, Code of 1940, probate judge is entitled to charge and collect only one fifty cents fee for making a decree on final settlement.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of January 8, 1942, in which you request an official opinion, is as follows:

"Please refer to Act 633 of the 1939 Legislature, approved July 10th, 1940, and advise me as follows:

"1. Should the library tax provided for in Title 62, Section 138 of the Code be taxed as costs in any case pending in this Court and if so, should such costs be taxed in all cases or should it be taxed only in those cases where Equity jurisdiction of the Court is invoked?

"2. Does the schedule of costs and fees applicable to the Register of the Circuit Court apply to all cases pending in this Court or does such schedule apply only in cases where the Equity jurisdiction has been invoked?

"3. If the fees allowed the Register are collected only when the Equity jurisdiction has been invoked should such fees be assessed in all subsequent proceedings in said estate or would the fees allowed the Probate Judge be collected in Statutory proceedings applicable to Probate Courts?

"4. Please refer to provisions of Title 11, Section 29, relating to decrees of partial and final settlement. You will note that the fee of \$1.50 is allowed for making a decree on a partial settlement and a fee of \$.50 is allowed

for making each decree on final settlement. We have been charging a fee of \$.50 for the final decree in favor of each distributee, or in case there are five distributees we charge on a basis of five decrees. Please advise if this is proper."

In answer to your first inquiry you are advised that, in my opinion, the library tax imposed by Section 138, Title 62, Code of 1940, should not be taxed or collected by you in any case pending in your court.

The pertinent parts of Section 138, supra, are as follows:

"§138. **Law Library tax.**— In each civil or quasi civil action at law, suit in equity, criminal case, quasi criminal case, proceeding on a forfeited bail bond, or proceeding on a forfeited bond given in connection with an appeal from a judgment of conviction in any inferior or municipal court to the circuit court, hereafter filed in, arising in, or brought by appeal, certiorari, or otherwise to the Circuit Court of Jefferson County, Alabama there shall be taxed as cost the sum of one dollar * * * ."

It will be noted from the above quoted excerpt from Section 138 that the law library tax only applies to those cases brought in the Circuit Court of Jefferson County. It is true that Act. No. 633, H. 1054, approved July 10, 1940, General Acts, 1939, page 1000, confers upon the Probate Court of Jefferson County, Alabama, equity jurisdiction concurrent with that of the circuit court, in equity, in the administration of estate of deceased persons, minors and insane persons and testamentary trust estates. Even though the probate court of your county has this jurisdiction it is none the less sitting and acting as a probate court, and not as a circuit court.

In answer to your second inquiry, reference is made to Section 6 of Act No. 633, supra, which reads as follows:

"Section 6. The Probate Judges of such Courts shall perform all the duties now required by law of the Judges and Registers of the Circuit Courts of this State, in reference to the administration of such estates and shall be entitled to assess and collect the same costs of court, charges, fees and commissions as are now authorized by law to be assessed and collected by Registers of the Circuit Courts for the performance of similar duties."

It is my opinion that the schedule of costs and fees applicable to the register of the circuit court applies only in those cases in which a particular act done by you is not done under the general statutory law applicable to probate courts. It will be noted from Section 7 of Act No. 663, supra, that the jurisdiction conferred by this act upon the probate court and probate judges is intended to be cumulative only. I construe the use of the word cumulative in this act to mean the broadening of the scope of your powers. To illustrate my position: If you are called upon to do a particular act in a particular estate matter, which is not provided for under general law applicable to probate courts, then in that matter and for that particular service you would be entitled to charge and collect the same fee as would be chargeable and collectible by the register of the circuit court. In other words, I do not be-

lieve that you would be entitled to charge and collect the fees applicable to the register of the circuit court in any estate matter where you were performing a service which is provided for under the general laws applicable to probate courts.

What I have said hereinbefore in answer to your second inquiry answers your third inquiry. That is to say, that where you are performing a service in an estate matter, and you could perform that service prior to the passage and approval of Act No. 633, supra, you would not be entitled to charge and collect those fees applicable to the circuit court.

In answer to your fourth question, you are advised that in my opinion the procedure outlined by you is not proper.

Section 29, Title 11, Code of 1940, provides as follows:

"§29. Fees allowed to judges of probate.—Judges of probate are entitled to the following fees for the following services: *** making each decree on final settlement \$.50."

It is my opinion that the fifty cent fee allowed for making each decree on final settlement may be charged only once for each decree. In actuality there is only one decree entered by you which is binding upon each party interested in the estate. It is true that there could be cases where there may be any number of distributees affected by a decree on final settlement. However, as stated above, there is only one decree binding upon all of the distributees.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 28, 1942

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Licenses—Attorneys

An attorney at law, who was duly qualified and admitted to the Alabama Bar Association and has not practiced in Alabama prior to April 2 of a year, on his return to the State after April 1, may procure a half year's license under Title 51 §850, of the Code of Alabama, 1940.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your inquiry dated January 7, 1942, in which you request an official opinion as follows:

"John Doe was duly qualified and admitted into Alabama State Bar Association, Title 46, Section 29-30, Code of 1940. After practicing in the State for several years he left the state and discontinued the payment of attorney's license, Title 51, Section 460, Code of 1940.

"Upon returning to the state in August, he then applied for license to resume his practice in Alabama.

"Is the applicant entitled to a half year license?"

In my opinion your inquiry should be answered in the affirmative.

Title 51, §850, Code of Alabama, 1940, provides as follows:

"§850. **License for part of year;—amount of tax.**—Unless otherwise provided, if any business licensed by this title shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases the license shall be taken out for the full term of one year, unless a shorter term is fixed by the provisions of this title. In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern."

In my opinion the term "business" as used supra, is used in a comprehensive sense and includes an attorney engaged in the practice of law as licensed under Title 51, § 460, which provides as follows:

"§460. **Attorneys.**—Each attorney engaged in the practice of law shall pay an annual license of twenty-five dollars to the state, but none to the county. If such business is conducted as a firm or as a corporation in which more than one lawyer is engaged, each lawyer shall pay such license; but no lawyer shall be required to pay a license until the first day of October following the expiration of two years from his admission to the bar. Fifteen dollars of the license herein levied shall constitute a separate fund to be disbursed by the comptroller on the order of the board of commissioners of the Alabama State Bar. As soon after the first day of each year as practicable the state treasurer shall certify to the secretary of the board of commissioners of the Alabama State Bar the names of attorneys who have paid such license fee, and the judge of probate of each county shall certify to the presiding judge of the circuit court having jurisdiction in such county the names of attorneys who have paid such license fee."

I think my position is strengthened by the fact that in the above quoted section, the practice of law is referred to as a business.

In Words & Phrases, Vol. 1 (5th) Series, at page 761, it is said:

“‘Business’ is a very comprehensive term and embraces everything about which a person can be employed. In re Booth, D. C. Okl., 18 F. Supp. 79, 81.

“‘Business’ in its broad sense is the efforts of men by varied methods of dealing with each other to improve their individual economic conditions and satisfy their desires. People, ex rel. Atty. Gen. v. Jersin, 74 P. 2d, 668, 670, 101 Colo. 406.

“The term ‘business’ in common parlance, means that employment which occupies the time, attention, and labor. Gardner v. Trustees of Main St. M. E. Church of Ottumwa, Iowa, 244 N. W. 667, 669.”

The premises considered, it is, therefore, my opinion that the applicant is entitled to secure a half years license.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 28, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Motor Carriers—Mileage Tax—Exemptions—

1. Carriers carrying newspapers and magazines on each mile actually operated and carrying no other load not subject to mileage tax.
2. Such carriers hauling newspapers and magazines one way and freight on return are liable for mileage tax on both trips.
3. Such carriers would be subject to mileage tax on the entire trip where freight, other than newspapers and magazines, is hauled on a fraction of the trip.
4. A vehicle which is not employed for the carriage of freight, but which is used exclusively for transportation of magazines and newspapers, is not subject to the mileage tax, even though the carrier holds itself out to haul freight generally.

5. "Contiguous" municipalities defined.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of December 2, 1941, in which you request an official opinion, is as follows:

"In the administering and collection of mileage taxes, the State Department of Revenue is desirous of having the following questions clarified under the 1939 Motor Carrier Act, and the Mileage Tax Act approved July 5, 1940:

"Section 2. Paragraph F of the Alabama Motor Carrier Act of 1939 reads as follows:

"'F. Motor vehicles while used exclusively in the transportation of newspapers and magazines.'

"Section 2 of the Mileage Tax Act reads as follows:

"'Section 2. That every motor carrier traversing the highways of the State subject to the provisions of an Act known as the Alabama Motor Carrier Act of 1939 shall pay to the State of Alabama into the fund of the State Department of Revenue as contribution to the maintenance, repair and policing of its public highways for each mile actually operated within the State on such public highways, whether such vehicle is loaded or empty *** .'

"There are certain carriers who have vehicles qualified with the Alabama Public Service Commission on which they display carrier plates, these vehicles being operated under authority granted by said Act pending the final decision of their 'Grandfather' application by the Alabama Public Service Commission, either as contract or common carriers.

"1. Would the above described vehicle be subject to mileage tax on each mile actually operated when the entire load consists of newspapers and magazines?

"2. Would the round trip of the above described vehicle be subject to tax when freight is hauled only one way, newspapers and magazines being hauled one way?

"3. Would the above described vehicles be subject to mileage tax on the entire trip when freight was hauled on a fraction of the trip?

"4. Would the fact that the above described carriers held themselves out to haul on each and every trip, although freight was not actually hauled, subject the vehicle to mileage tax?

"Section 2. Subsection A-2 of the Alabama Motor Carrier Act of 1939, reads as follows:

"(2) Motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof; or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous."

"5. There are certain incorporated cities and towns within the State of Alabama whose police jurisdictions do not touch but are divided by an open stretch of state highway varying in distance from one fourth of a mile to a mile and a half. Would motor vehicles operating between such towns be subject to the Motor Carrier Act of 1939 and to the Mileage Tax Act approved July 5, 1940?"

Title 48, Section 301(34), appearing in the 1941 Cumulative Pocket Part of the Code of Alabama, 1940, provides in pertinent part as follows:

"§ 301(34). Mileage taxes.—Every motor carrier traversing the highways of the state subject to the provisions of article 3 of this chapter shall pay to the State of Alabama into the fund of the department of revenue as contribution to the maintenance, repair and policing of its public highways for each mile actually operated within the state on such public highways, whether such vehicle is loaded or empty, a mileage tax of ***."

Article 3, referred to in the above section, is the article regulating motor carriers. Your first four inquiries necessitate a consideration of Section 301(2) of Title 48, as that section appears in the 1941 Cumulative Pocket Part, *supra*, in order to determine whether under the particular instances set forth in your letter of inquiry, the carriers are "subject to the provisions of Article 3."

The portion of Section 301(2), *supra*, applicable to your first four inquiries is as follows:

"This article shall not be construed to apply to: *** F. Motor vehicles while used exclusively in the transportation of newspapers and magazines."

It is my opinion that under the exception stated in Section F, *supra*, the following instances (and only these) are illustrative of "exclusive" transportation of newspapers and magazines: (1) Motor vehicles making round trip loaded only with magazines and/or newspapers; (2) Motor vehicles making a trip loaded with newspapers and/or magazines and returning empty, and vice versa.

It may be noted in passing that a gratuitous transportation of commodities other than newspapers or magazines will not vitiate the exemption. Cf. *Monroe Com. Carrier Application*, 8 M.C.C. 183.

In my opinion, the exception does not permit of a construction which would allow the exemption of a vehicle hauling newspapers and magazines to a given point and returning with a pay load of a non-exempt commodity. While the construction of the statute is not clearly obvious, I find myself constrained to follow the opinions of the Interstate Commerce Commission dealing with a similar provision rather than take the uncharted course. Your attention is called to the following observations of the Interstate Commerce Commission which are adopted as the basis for the above conclusions:

"It would be an anomalous situation under which a single operator of motor vehicles would at one and the same time, as to different parts of its operations, be a private carrier not subject to regulations and a contract carrier subject to regulation. The difficulties which such a status would present with reference to accounting, statistics, issue of securities, unifications, and the like are obvious.

"Apart from this objection to such a combination of functions, it is clear that the public interest, as declared in the policy of Congress, requires motor carriers able to supply 'adequate economical and efficient service' to the public 'without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices.' A private carrier has the advantages of an assured traffic obtained without solicitation expense, freedom from the expenses which public regulation necessarily entails, and often an overhead or management expense shared with the commercial enterprise for which the hauling is done. A disadvantage which it often suffers is lack of a well-balanced traffic in both directions. If the private carrier be able to overcome this disadvantage by operating as a contract carrier in one direction, it is evident that advantages which it enjoys in its private carriage will enable it to compete on better than even terms with most contract carriers, to say nothing of common carriers.

"The appellant here is an individual engaged in commercial enterprise in a small way, but many private carriers are associated with large industries. If private carriers generally were permitted to engage in contract-carrier operations in the manner here proposed, it is clear that the results might seriously affect the maintenance of adequate and efficient service by the motor common carriers upon whom the general public must depend, and by the contract carriers who do not also engage in private carriage. We are of the opinion that such a mixture of private-carrier and contract-carrier operations is definitely inconsistent with the public interest and with the policy declared in section 202(2)."

Geraci Contract Carrier Application, 7 M. C. C. 372.

The foregoing logic impels a like conclusion here; i. e., a motor vehicle carrying newspapers and magazines on one trip and a pay load of non-exempt commodities on the return trip is subject to the provisions of Title 48, Chapter 3, Articles 3 and 4, *supra*, both as to the transportation of newspapers and magazines and its transportation of other commodities for compensation on the return trip. Cf. Ruling No. 43, November 7, 1936, of the Interstate Commerce Commission, wherein the Commission, in interpreting

"exclusive" hauling of livestock, as used in Section 203(b)(c) of the Federal Motor Carrier Act, states the identical view. (C.C.H. Fed. Carriers Service No. 6043).

Neither do I believe that the exception can be interpreted to apply to those cases where a vehicle is used indiscriminately in the transportation for compensation of newspapers or magazines and of other commodities. I do not mean to imply that a vehicle may not be occasionally used for other purposes. I believe, however, that in order to be exempt the vehicle must be set aside or dedicated to the exempt uses and not employed for other purposes by the motor carrier. It is my opinion that an interpretation of the exception which would relate the word "exclusively" to the individual haul of a vehicle instead of to the entire operation of the vehicle, would make the law unenforceable. Cf. *State v. Public Service Comm. of Wisconsin*, 242 N. W. 675, 676; *Elliott, Extension of Operations*, 1 Fed. Carriers Cases No. 7208.

I have not overlooked the implication of an intended partial or part-time exemption arising from the use of the word "while" in the exception—"while used exclusively in the transportation", etc. It is my opinion, however, that the word "while" means merely "during the time that" or "so long as"; that it must be read in connection with the word "exclusively" which also appears in the exception, and that it in no sense alters the construction given above.

Further illustrative of my position on this question is the fact that in Subsection A(1) of Section 301(2) of Title 48, supra, the Legislature, in exempting school busses or other motor vehicles owned or under contract with county boards of education, employed the language "regardless of whether or not such school busses and other motor vehicles are being used exclusively for the transportation of school children and school teachers to and from school" to indicate its intention to exempt the vehicles however used. In the present case, however, and in all like exceptions when it was obviously intended only to exempt vehicles when employed in the particular manner designated in the exception, the Legislature uniformly employed the expression "while exclusively used," etc. The word "while" obviously takes nothing away from the restrictive term "exclusively"—it merely emphasizes the exclusiveness of the use.

As above stated, any other conclusion would cause complete and utter confusion and would open the door to easy evasion. A single example should suffice. If it were to be held that a vehicle might fall within the exempt category on the trip from Montgomery to Birmingham if on such trip from Montgomery to Birmingham it carried newspapers, even though on the return trip it carried a pay load of a non-exempt commodity, it would be an easy matter for the motor carrier who had a pay load waiting for him in Birmingham to arrange to haul a small load of newspapers to Birmingham and thus operate free from regulation. When this operation is contrasted with the requirement that a carrier operating an empty vehicle to Birmingham and returning with a pay load must be subject to the regulations on both trips (Section 301(34)), the logic and reasonableness of the conclusions above reached is at once apparent.

Accordingly, your specific inquiries Nos. 1 and 4 are answered in the negative, while your inquiries Nos. 2 and 3 are answered in the affirmative.

Your fifth inquiry is answered in the negative. The pertinent provision of the motor carrier act, appearing in the 1941 Cumulative Pocket Part of the 1940 Code, applicable to your fifth inquiry is as follows:

"Title 48, § 301(2). Application of article.—This article shall not be construed to apply to: *** (2) Motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof; or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous."

In answering your fifth inquiry, I have again resorted to court and commission decisions relating to the construction of a similar provision in the Federal Motor Carrier Act of 1935. This act (49 U.S.C.A. 303b(8)) exempts "the transportation of passengers or property in interstate or foreign commerce *** between contiguous municipalities."

In an early decision involving a construction of this section the Commission stated:

"'Contiguous municipalities' are municipalities which touch or adjoin at the edge or boundary or are in close proximity to one another."

It then proceeded to limit this definition as follows:

"*** To be 'contiguous' for the purposes of this Act we are of the opinion that there must be direct communication by motor vehicles between the municipalities."

Proceeding to apply the definition as thus stated and limited, the Commission concludes:

"St. Louis is an independent city in the sense that it is not included within any county in Missouri. Its present boundaries were fixed in 1876. The record does not indicate definitely whether the eastern boundary of St. Louis forms part of the western boundary of East St. Louis, and for that reason some of the parties question whether the two cities are contiguous. Regardless of the political boundaries, **nothing intervenes between the populated areas of the cities except the Mississippi River, and they are connected by bridges** over which there is a constant flow of vehicular traffic. Under the circumstances, we are of the opinion and find that the two cities are contiguous. Venice, Ill., is the only other municipality in Illinois which is directly connected with St. Louis by bridge. **Other municipalities in Illinois lie across the Mississippi from St. Louis, BUT THEY ARE NOT CONTIGUOUS** within the meaning of section 203 (b) (8), because there are no means of communication by motor vehicle between them and St. Louis except through **OTHER** municipalities. The municipalities in Missouri contiguous to St. Louis, in the sense that they touch or adjoin that municipality, are University City, Clayton, Richmond Heights, Maplewood, and Shrewsbury. Municipalities other than

St. Louis which in the same sense are contiguous to East St. Louis are National City, Fairmont City, Washington Park, Belleville, and Monsato, Ill."

St. Louis, Mo.-East St. Louis, Ill. Commercial Zone, 1 M.C.C. 658.

From the foregoing decision, and other decisions of the Commission establishing commercial zones, it is apparent that municipalities are deemed by the Interstate Commerce Commission to be "contiguous" when their boundaries (or police jurisdictions) touch or adjoin or when they are separated only by water, over which there is a bridge or under which there is a tunnel. Cf. Ed Goyean Contract Carrier Application, 8 M.C.C. 359; 11 M.C.C. 519, holding Detroit, Michigan and Windsor, Canada contiguous though on opposite banks of the Detroit River, since they are joined by tunnel and bridge. See also: New York, N. Y. Commercial Zone, 1 M.C.C. 665 (The principle of this decision is affirmed in *Noeding Trucking Co. v. U. S.*, 29 F. Supp. 537, 549) and Chicago, Ill. Commercial Zone, 1 M.C.C. 673.

In Washington, D. C. Commercial Zone, 3 M.C.C. 243, the Commission declined to consider Alexandria contiguous to Washington although that city was opposite the southern part of the city, observing, "There are no means of communication between the cities by motor vehicle except through unincorporated areas."

The foregoing authorities have been cited and quoted from to illustrate that the term "contiguous", as used in the Motor Carrier Act, has acquired a distinctly technical meaning, which, although probably different from the generally accepted meaning of the term as employed in everyday usage, bears a logical and orderly relationship to the context of the statute. It is my opinion that it was the legislative intent in employing this term in Title 48, Subsection A(2) of Section 301(2), *supra*, that it be accorded this well established technical meaning. Additional persuasive evidence of this intention is the fact that the Legislature saw fit to use the word "contiguous" disjunctively with the word "join." The language used is "between two or more incorporated town or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous." Assuming, as I must, that the Legislature intended each word used to have a distinct meaning, I am impelled to the conclusion that "contiguous," as here used must have a connotation more comprehensive than the commonly accepted meaning "join." It is reasonably to be assumed, therefore, that the Legislature intended the meaning to be that given the word by the interpreters of the Federal Motor Carrier Act upon which the Alabama Motor Carrier Law was framed.

You are therefore advised that city, towns and police jurisdictions are "contiguous" only when their boundaries touch or adjoin or when they are separated only by water, and in this last event, only when there is a direct communication by motor vehicle between them, as by bridge, tunnel or the like. Accordingly, where the police jurisdictions of the cities or towns are separated by an open stretch of highway, such cities or towns cannot be

deemed "contiguous" and carriers operating between them are not exempt from the mileage tax.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 29, 1942.

Hon. W. C. Register,
Tax Assessor,
Geneva County,
Geneva, Alabama.

Tax Sales—Escapes—Code 1940, Title 51, Section 267—Invalid Sales—

I. Where land was erroneously assessed as the property of a tax payer not owning the same, or the tax collector failed to report to the probate judge his inability to collect the taxes thereon without sale thereof, or notice of sale erroneously listed said land in a beat or precinct in which it was not located said sale was void.

II. Where such invalidity did not appear on the face of the certificate of purchase made by the probate judge under Code 1940, Title 51, Section 267 and said sale was not cancelled by the Comptroller but was recorded by the Land Commissioner in his office as required by law the tax assessor is not authorized to assess said land as an escape unless and until such invalid sale is set aside or cancelled by decree or judgment of a court of competent jurisdiction.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your letter of November 24, 1941, in which you request an official opinion, is as follows:

"I desire to know whether or not the sale of a certain tract of land located in Geneva County, Alabama, for taxes for the year 1936 was a valid sale, the facts being substantially as follows:

The property in question was owned by Mr. and Mrs. P. C. Anderson at the time the assessment was made, but the Farmers and Merchants National Bank of Enterprise, Alabama, held a mortgage on said land and the land was assessed to them for taxes for the year 1936.

Neither the bank nor Mr. or Mrs. Anderson paid the taxes. The Tax Collector failed to sign his report to the Probate Judge certifying that it was necessary to sell the land in order to collect the taxes; however, on June 14, 1937, the Judge of Probate made and entered an order setting July 12, 1937 as the date to hear said cause and directed that notice be given to the owner ten days before the date set for the trial. The docket shows that notice issued on July 14, 1937, (sic) but does not show upon whom service was had, but the docket does recite that service was had. It appears that the hearing was continued from term to term to January 3, 1938, at which time the court made an order directing that the Tax Collector sell so much of the land as was necessary to pay the taxes, fees, charges and costs; that on March 22, 1938 the Tax Collector reported to the Judge of Probate that after giving notice for thirty days by publication for three successive weeks in the Samson Ledger that he, on March 22, 1938, (sic) sold the property for the sum of \$17.35 and that at said sale the State of Alabama became the purchaser; that on March 22, 1938 the Judge of Probate made an order that the matter lie over for five days for objections or exceptions and on March 29, 1938 the court made and entered a decree confirming the sale and directing the Tax Collector to issue a certificate of purchase to the purchaser. The land was located in Beat 9 but was listed under Beat 10 in the notice of sale that was published in the paper.

"It is contended by the owner of the property that the tax sale was void and, as I understand it, they base their contentions on the following three propositions: first, that the land was not properly or legally assessed; second, that the Probate Judge was without jurisdiction to order the Tax Collector to sell the land because there was no report from the Tax Collector to the Probate Judge that the taxes could not be collected without a sale of the land; and third, that the Tax Collector should have listed the land in his notice of sale as being in Beat 9, where the land is located, instead of Beat 10.

"In the event the sale is held to be void, then I desire to be advised on the proper course for me to pursue in order to get the property back on the tax books. I might add that the property has not, since the sale hereinabove referred to, been assessed to any one nor has any taxes been paid on said property. Would it now be proper to assess the land as an escape for five years back?"

The tax sale in question was invalid on any one of the above grounds, to wit: failure to assess the property sold in the name of the true owner, failure of the tax collector to report to the probate court his inability to collect the taxes without sale of said land, and erroneous description of the land sold in the notice of sale by failing to list it in the beat or precinct in which it was located. Quarterly Reports, Attorney General: Volume 22, page 59, Volume 20, page 177; *Henderson vs. Simmons*, 234 Ala. 329, 174 So. 491; *Craig vs. Swader*, 225 Ala. 366, 143 So. 553; *Boyce vs. Morrow*, 226 Ala. 627, 148 So. 326; *Lodge vs. Wilkerson*, 174 Ala. 133, 56 So. 994; *Pollak vs. Milan*, 190 Ala. 569, 67 So. 381.

The invalidity of the sale evidently did not appear upon the face of the certificate required to be made by the judge of probate and by him delivered to the tax collector for delivery to the Comptroller as required by Code 1940, Title 51, Section 267. It is to be assumed therefore that the Comptroller did not cancel the sale for any irregularity or on any other ground of invalidity and that the Comptroller as required by Section 267, supra, delivered the certificate to the Land Commissioner, who recorded the same as required by law.

This reduces the situation to that considered in an opinion of this office dated January 31, 1940, to Hon. Matt. A. Boykin, Judge of Probate, Mobile County. (Quarterly Report, Attorney General, Volume 18, page 144).

In that opinion it was ruled and held that in cases where the invalid sale had not been cancelled by the Comptroller, pursuant to Section 267, supra, then appearing as Section 232 of the Revenue Act of 1935, the tax sale although erroneous could be set aside only by proper court procedure and that the tax assessor could not assess the property so erroneously sold as an escape "in the absence of a proper judgment from a court of competent jurisdiction," setting the sale aside.

You are, therefore, advised upon the authority aforesaid that you are not authorized to assess the land in question as an escape unless and until the entry in the record of sale in the office of the State Land Commissioner has been set aside or cancelled by the decree or judgment of a court of competent jurisdiction.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 2, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
Department of Revenue,
Capitol.

Federal Savings and Loans—Franchise Tax—Permit Fee—

1. Federal Savings and Loan Associations liable for domestic corporation franchise tax.
2. Federal Savings and Loan Associations liable for franchise tax only on non-withdrawable stock.
3. Federal Savings and Loan Association is liable for domestic corporation permit fee.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of January 15, 1942, is as follows:

"Re: Federal Saving & Loan Associations Franchise Tax and Permit Fee

"Your opinion is respectfully requested with respect to the following questions:

"1. Are Federal Saving & Loan Associations organized and operating pursuant to Act of Congress (Title 12, Section 1464, U. S. C. A.), liable for corporation franchise tax?

"2. If so, is such association liable for the foreign or domestic corporation franchise tax?

"3. Should such tax be limited to non-withdrawable capital stock?

"4. Is such association liable for corporation permit fee?"

Federal Savings and Loan Associations are organized and operate pursuant to the provisions of Title 12, Sections 1464, U.S.C.A. Subdivision (h) of Title 12, Section 1464, supra, as amended August 10, 1939, c. 666 Title IX, Section 909, 53 Stat. 1402, is as follows:

"(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 31, 1939, for employment after such date) and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

From the above it will be noted that the Congress of the United States has given the several states the right to impose a tax upon the franchise, capital, reserves, surplus, loans, or income of the Federal Savings and Loan Associations operating within their respective boundaries, provided that the tax is not greater than that imposed upon "other similar local mutual or cooperative thrift and home financing institutions" therein operating.

Attention is called to Code 1940, Title 5, Section 250, which is as follows:

"§250. Foreign associations may not operate.—No foreign corporation shall transact any business of a savings and loan association within this state or maintain an office in this state for the purpose of transacting such business. Federal savings and loan associations, incorporated pursuant to an act of congress known as the home owners' loan act of 1933, are not foreign corporations, and any such federal association shall be subject to the same taxation and entitled to the same privileges as associations subject to this chapter."

It will be noted that Section 250, *supra*, provides that no foreign corporation is authorized to transact any business of a savings and loan association within the State of Alabama. Also, that Federal Savings and Loan Associations are not foreign corporations and are subject to the same taxation and entitled to the same privileges as domestic corporations. Cf.—Biennial Report of Attorney General, 1934-36, p. 147.

It, therefore, follows, and it is my opinion, that a Federal Savings and Loan Association doing business within the State of Alabama is liable for a domestic corporation franchise tax.

The above answers your first and second inquiries.

I answer your third inquiry in the affirmative.

Section 229 of the Constitution of 1901, as amended, is as follows:

"Section 229. The Legislature shall pass no special Act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the Legislature; and shall pass general laws under which charters may be altered or amended. The Legislature shall, by general laws, provide for the payment to the State of Alabama of a Franchise Tax by corporations organized under the laws of this State which shall be in proportion to the amount of capital stock; but strictly benevolent, educational or religious corporations or Federal building and loan associations organized pursuant to an Act of Congress known as the Home Owners' Loan Act of 1933, as amended, and as the same may hereafter be amended, or building and loan associations organized under or authorized to do business by the laws of Alabama shall not be required to pay such a tax on their withdrawable or repurchaseable shares. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws. Exemption of the shares of building and loan associations from franchise tax heretofore provided by statute is ratified."

It will be noted that Section 229, *supra*, provides that Federal Savings and Loan Associations are not required to pay a franchise tax on their withdrawable or repurchaseable shares. This then leaves only the non-withdrawable capital stock of a Federal Savings and Loan Association doing business in the State of Alabama liable for franchise tax.

In my judgment, your fourth inquiry should be answered in the affirmative.

Code 1940, Title 51, Section 346, provides as follows:

"§346. Domestic corporations.—Every domestic corporation organized under or by authority of the laws of the State of Alabama, in addition to other license and privilege taxes required to be paid by law, and for the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the said corporations and individual officers thereof, shall be required to procure from the department of revenue when it is authorized by law to do business, and annually thereafter, a permit, which permit shall be prepared by and countersigned by the comptroller, and shall be delivered by the comptroller to the department of revenue in a well bound book with the stub and blanks therein showing the date thereof, the names of the corporations and when issued, and the character of business engaged in by said corporation. The issuance of such permit to any such corporation shall be prima facie evidence of its having complied with all the laws required of it before engaging in business in this state. For all such permits said corporation shall, when authorized to do business as a corporation, and annually thereafter, on or before the first day of February of every year, pay to the department of revenue a fee of ten dollars per annum, or for a part of a year, if the paid capital stock of such corporation is less than twenty-five thousand dollars; if more than twenty-five thousand and not over fifty thousand dollars, it shall pay the sum of twenty dollars; if the paid capital stock is in excess of fifty thousand, but not in excess of one hundred thousand dollars, a fee of thirty dollars shall be paid; if the paid capital stock is in excess of one hundred thousand dollars and not in excess of one hundred and fifty thousand, the fee shall be fifty dollars; if the paid capital stock is in excess of one hundred and fifty thousand dollars, the fee shall be one hundred dollars. The department of revenue shall keep a full and complete account of all moneys received by it for and on account of such permit, and shall pay the same into the state treasury as all other moneys collected or received by it are paid into the state treasury. If any corporation fails or refuses to take out the permit herein provided for within thirty days after the first day of January such corporation shall be required to pay a penalty of five dollars per day for each day's delinquency; provided, further, that, for good cause, the department of revenue may relieve any domestic corporation of all or any part of the penalty imposed herein. Application for said permit shall be made by said corporation, as provided by law, giving the name and address of said corporation, its principal place of business where organized, its principal place of business in Alabama; its agent upon whom process can be served, his address, and the names of the president and secretary of said corporation. Strictly benevolent, educational or religious corporations shall not be required to pay such permit fee."

Section 346, supra, makes all domestic corporations liable for the permit fee therein levied with the exception of those expressly exempt. It is my judgment, based upon the authorities and conclusions heretofore set

forth in this opinion, that a Federal Savings and Loan Association operating within this State is liable for the permit fee provided for in Section 346, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 2, 1942.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Code 1940, Tit. 51, §§618-619—Deed and Mortgage Filing Tax—
Home Owners' Loan Corporation.

Deed of Home Owners' Loan Corporation reciting a cash payment and execution by grantee of a mortgage securing the unpaid purchase money is subject, when offered for record by the grantee, to payment of deed tax based on the value of the property conveyed without deduction of the amount of mortgage debt.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 20, 1942 is as follows:

"A Statutory Warranty Deed has been filed in my office for record, conveying certain real estate from Home Owners' Loan Corporation to Tom English and it reads in part as follows:—

"That in consideration of One Hundred and No/100 (\$100.00) Dollars to the undersigned Grantor, Home Owners' Loan Corporation, a corporate instrumentality of the United States of America, in hand paid by Tom English, Grantee, the receipt whereof is hereby acknowledged, and the delivery simultaneously herewith of a purchase money mortgage by the Grantee to the Grantor on the hereinafter described property in the sum of Nine Hundred and no/100 (\$900.00) Dollars, the said Home Owners' Loan Corporation, a corporation, has bargained and sold and does hereby grant, bargain, sell and convey unto the said Tom English, the following described real estate, etc.'

"I have ascertained the value of this real estate so conveyed, not to exceed \$1,000.00 and your official opinion is requested as to whether a deed filing tax should be collected on the down payment and a mortgage filing tax on the balance or should a deed filing tax only be collected on the \$1,000.00 valuation."

I am of opinion that under the facts above stated you should collect a deed filing tax based upon the value of the property conveyed, which you say is \$1,000.

The deed filing tax is to be calculated on the value of the property conveyed by the deed offered for record, without regard to the recitals of the consideration therein. Code 1940, Tit. 51 § 618. **Biennial Report, Attorney General, 1932-34, p. 149.**

While it is true that said Section 618 provides that "only the value in excess of any mortgages or vendors' lien upon any property *** **on which the mortgage tax has been paid** shall be payable under this section," it may be inferred that no mortgage tax has been paid or will be paid by Home Owners' Loan Corporation for record of its mortgage referred to in its deed to the grantee as part of the consideration for said deed. Said mortgage is not subject to payment of the mortgage filing tax when offered for record by said mortgagee. **Biennial Report, Attorney General, 1932-34, p. 544.**

The deed in question, therefore, does not come within the exception of pro tanto exemption to the general rule or basis declared in Section 618 supra, whereby the deed filing tax is measured, because no mortgage filing tax has been paid for record of the mortgage to which the property conveyed by the deed is subject. **Biennial Report, Attorney General, 1930-32, p. 1046. Biennial Report, Attorney General, 1936-38, p. 729. Quarterly Report, Attorney General, Vol. 17, pp. 176 and 265.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 2, 1942.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Counties—Schools—Temporary Loans — Constitutional Law—

1. A county governing has the legal power and authority to make an appropriation to a county board of education for use in the completion of a high school building in the county, duly recognized by

the State Board of Education as a center for vocational instruction of the Smith-Hughes type.

2. A county governing body may make a temporary loan in anticipation of the collection of taxes for the year in which such loan is made with which to secure the funds to pay such appropriation, even though the county is up to its constitutional debt limit, such a temporary loan not being a debt within the purview of Section 224 of the Constitution of Alabama of 1901.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of January 28, 1942, is as follows:

"Will you please advise me whether or not I should pay an appropriation of \$5,000.00 authorized by the Court of County Revenue of this County at its regular meeting in December, 1941, to be paid from the General Fund of the County to the County Board of Education for the use of completing the building of the high school at Russellville in said County; said building being that of the Smith-Hughes vocational type, mentioned in Title 52, Section 388 of the Code; the County is up to the constitutional debt limit, and the General Fund has been budgeted for the fiscal year as to anticipated revenue from all sources (not including any funds that may be derived from loans), and a loan on a temporary certificate pledging the income from the current tax assessment, when collected, to its payment, will have to be negotiated and the proceeds derived therefrom placed in the General Fund before the payment of the said authorized appropriation can be made to the said Board of Education. The County can do this without impairing its ability to meet current obligations, and is willing to do so, if legal.

"The school authorities insist that this matter is urgent and I will appreciate an opinion at your very earliest convenience."

There is no doubt about the legal power and authority of a county governing body to make an appropriation to a county board of education to be used in completing a high school located in said county which is duly recognized by the State Board of Education as a center for vocational instruction of the Smith-Hughes type. Code of Alabama, 1940, Title 52, Section 388, specifically vests a county governing body with such authority. It reads:

"§ 388. County and city make appropriation for Smith-Hughes type vocational training.—Boards of revenue and courts of county commissioners of counties of Alabama are hereby authorized to make appropriations to county boards of education to be used in providing classrooms, laboratories, and shops for use in teaching vocational subjects, and for maintaining such vocational departments after they have been established; provided that such appropriations may only be made for use in any school

or schools duly recognized by the State board of education as centers for vocational instruction of the Smith-Hughes type, and on account of which reimbursement is being made or is to be made during the next fiscal school year following the first payment of county funds appropriated for such purposes."

See opinion to Prof. F. J. Hodges, County Superintendent of Education, Jackson County, Scottsboro, Alabama, under date of July 29, 1932, Biennial Report of Attorney General, 1930-32, page 946, and to Hon L. H. Reynolds, Judge of Probate, Chilton County, Clanton, Alabama, under date of March 23, 1933, Biennial Report of Attorney General, 1932-34, page 195, which reached a like conclusion under the then applicable forerunners of Section 388 supra.

In my opinion, your county governing body may make a temporary loan in anticipation of the collection of taxes for the year in which such loan is made to secure the necessary funds with which to pay such appropriation, notwithstanding the fact that your county is up to its constitutional debt limit, as such a temporary loan is not a debt within the purview of Section 224 of the Constitution of Alabama, 1901, which fixes the constitutional debt limit of counties, as will be hereinafter shown.

The presently applicable statutory provisions dealing with the power and authority of county governing bodies to make temporary loans in anticipation of the collection of taxes for the year in which such loans are made are found in Code of Alabama, 1940, Title 12, Chapter 9, Sections 124-128. The complete legislative history of these provisions is related in an opinion of this office to Hon. J. S. Wittmeier, Judge of Probate, Blount County, Oneonta, Alabama, under date of September 16, 1941, Quarterly Report of Attorney General, Vol. XXIV, page 219. It might be well to also here observe that the decisions of the Supreme Court of Alabama in the case of **Brown v. Gay-Padgett Hawe. Co.**, 188 Ala. 423, 66 So. 161, decided in 1914, undoubtedly gave rise to the enactment of the original statutory provisions authorizing such loans which were enacted in 1915.

It seems clear that the proceeds of such a temporary loan may be used for any general purposes of the county authorized by law. See opinion of the Attorney General to the Judge of Probate of Henry County, Abbeville, Alabama, under date of August 24, 1928, Biennial Report of Attorney General, 1926-28, page 716, in which it was observed, as to the then applicable statutory provisions authorizing county governing bodies to make temporary loans in anticipation of the collection of taxes for the year in which such loans are made:

" * * * these sections do not restrict your board as to how such money may be expended, and I take it that the board can spend it for general purposes as allowed by law."

That the proceeds of such a loan may be used for general purposes of the county authorized by law is now definitely established by the last proviso contained in Section 125, supra, which reads:

" * * * no proceeds from any loan made under the provisions of this chapter shall be used for any purpose other than that for which general funds may now be used."

In the recent case of **Bullock County et al. v. Sherlock**, Supreme Court MS, decided January 22, 1942, the Supreme Court speaking through Justice Bouldin, observed as to the statutory provisions dealing with such temporary loans:

"The proceeds of temporary loans, in anticipation of the collection of taxes, negotiated under Tit. 12, §124, et seq., can be used only for purposes for which general funds of the county may be used. This statute looks to a reduction of such borrowings from year to year. See, also, **Ramage, Parks & Co. v. Folmer, County Treasurer**, et al., 219 Ala. 142, 212 So. 504."

A careful research does not disclose a decision of the Supreme Court of Alabama on the question of whether or not a temporary loan made in anticipation of the collection of taxes for the year in which such loan is made, to the repayment of which a sufficient amount of such uncollected taxes is pledged, is a debt within the purview of Section 224 of the Constitution of Alabama, 1901, which fixes the constitutional debt limit of counties. In fact, the only decision of the appellate courts of this State dealing with the statutory provisions providing for such temporary loans, which I have found, other than the recently decided case quoted from, supra, is the one cited in that quotation, and it does not deal with this question.

However, this question was considered and decided by the Federal District Court for the Middle District of Alabama in the case of **Troy National Bank v. Russell County**, 291 Fed. 185, where it was held that such a temporary loan made under the original statute authorizing such loans, was not a debt of the county within the purview of Section 224, supra.

The case of **Bullock County et al. v. Sherlock**, supra, was a proceeding for declaratory judgment, which originated in the Circuit Court of Montgomery County, Alabama. One of the questions propounded to the trial court for declaratory judgment was:

"Would such a temporary loan or loans (a temporary loan in anticipation of the collection of taxes for the year in which made) be a debt of Bullock County within the purview of Section 224 of the Constitution of Alabama, 1901?" (Parenthesis supplied)

The trial court in its final decree and declaratory judgment answered that question as follows:

" * * * such temporary loan or loans would not be a debt of Bullock County within the meaning and purview of Section 224 of the Constitution of Alabama, 1901."

The Supreme Court declined to pass upon this question on the ground that it was not within the justiciable issue presented by the facts of the case.

Since the question is an open one so far as the appellate courts of this State are concerned, I am of the opinion, on the basis of the decision of the Federal District Court in the case of **Troy National Bank v. Russell County**, supra, and of the Circuit Court of Montgomery County in the case of **Bullock et al. v. Sherlock**, supra, that a temporary loan in anticipation of the collection of taxes for the year in which such loan is made is not a debt within the purview of Section 224, supra. In the case of **Brown v. Gay-Padgett Hdw. Co.**, supra, the court quoted with approval the following excerpt from **In Re: State Warrants**, 6 S. D. 518, 62 N. W. 101, 55 A. S. R. 852, as to such a question:

"Critically considered, it may constitute the incurring of an indebtedness; but it is not an indebtedness repugnant to the Constitution, because its payment if legally provided for by funds constructively in the treasury. If the drawing of a warrant upon the state treasury is the incurring of an indebtedness by the state, then the drawing of such warrant would violate the Constitution, even if there was money in the state treasury to pay it, if the constitutional limit of indebtedness had been reached; for there must always be some time intervening between the drawing of the warrant and its payment, and during such time the indebtedness of the state would be increased beyond the constitutional limit. Such an interpretation of the constitutional limitation would obviously be too hypercritical to be practicable or reasonable. It being once established, as we think it is by the authorities already cited, that the revenues of the state assessed and in process of collection may be considered as constructively in the treasury, they may be appropriated and treated as though actually and physically there; and an appropriation of them by the Legislature does not constitute the incurring of an indebtedness within the meaning of section 2, art. 13."

As observed by Judge Clayton, the author of the opinion in **Troy National Bank v. Russell County**, supra, such a conclusion "accords with reason and 'common sense.'"

The premises considered, it is my opinion that your county governing body may make an appropriation to your county board of education for use in the completion of a high school building in the county, duly recognized by the State Board of Education as a center for vocational instruction of the Smith-Hughes type; and that it may make a temporary loan in anticipation of the collection of taxes for the year in which such loan is made with which to secure the funds to pay such appropriation, even though the county is up to its constitutional debt limit, such a temporary loan not being a debt within the purview of Section 224, supra.

Since you state that you can make a temporary loan, the proceeds of the same to be used for paying the contemplated appropriation to the county board of education, without impairing the ability of the county to meet current obligations, it is not necessary to here consider whether or not the proceeds of such a loan would have to be used for the payment of all involuntary and necessary obligations of the county before the same could be used for the payment of a voluntary obligation of the county, such as is the contemplated appropriation to the county board of education.

For your guidance as to the amount of such a temporary loan which a county may make, you are respectfully referred to the table showing the borrowing limit on temporary loans under Section 125, supra, set out in the opinion to Judge Wittneier, supra.

As to the manner in which a temporary loan should be handled in making up the budget required by the County Financial Control Law, Code of 1940, Title 12, Chapter 6, Sections 73-91, and particularly Section 74, you are respectfully referred to Section 85.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 2, 1942.

Hon. Bradley G. Brown,
License Inspector,
Jefferson County,
Birmingham, Alabama.

Licenses—License Inspectors—

Where license inspector cites "John's Place" and John Smith, owner of "John's Place," takes out license, John Smith not liable for citation fee.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

We have your request for official opinion, bearing date of January 10, 1942, as follows:

"Because of the numerous licenses issued in this County, once in a while a person who has been duly cited in one name, applies to the Probate Judge for a license in another name, and because our duplicate citation on file with the License Commissioner doesn't correspond with the name in which he procures the license, he doesn't pay the citation fee. As an illustration:

"We cite John's place for soft drinks, tobacco and restaurant licenses. The owner comes in and buys the license in the name of John Smith and does not pay a citation. This office immediately contacts John Smith and advises him that he owes \$1.50 citation fee on each license, which he refuses to pay.

"I would appreciate you advising me as to whether or not this office has the right to proceed criminally against this person, i. e. swear out a

warrant for violating the revenue law. If we are not within our legal right in this procedure, what is our remedy?"

In answer to your inquiry, I am of the opinion that you have no right to proceed criminally against John Smith, the name of the person set out above in your illustration, and that you have no remedy against him to enforce the collection of the citation fee to which you refer.

Title 51, Section 835, Code of Alabama 1940 provides in part as follows:

"* * * It shall be the duty of the license inspector to scrutinize the records and stubs kept in the office of the probate judge, and also to examine the license records of each city or town located in the county or counties of which he has been appointed license inspector and if it shall be reported to any license inspector or come to his knowledge that any person, persons, firms or corporations have failed or refused to take out license for a business or occupation for which a license is required by the state, or have failed or refused to take out license for operating any motor vehicle or trailer for which license is required by law, the license inspector shall thereupon cite such delinquent to appear before the license inspector at the courthouse of the county in which such citation is issued and show cause why the license or privilege tax required by law has not been paid, and at the same time shall file with the probate judge of the county a copy of such citation showing service on the delinquent. * * * (g) License inspectors are authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for the same. Such deputies shall receive no compensation for their services out of the state or county revenue, except in cases as otherwise provided in this title. All citations to delinquents shall be served by any lawful officer, or by the license inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents for each citation served, to be taxes against the delinquent. * * * " (Emphasis added).

The section set out above provides that the delinquent shall be cited to appear. In the situation which you have used as an illustration, and which I am using as the basis for this opinion, citations were issued which cited "John's Place" to appear and show cause why the licenses required by law had not been paid. No citations were issued citing John Smith, the owner of the business to appear. John Smith having taken out the license required by law no citations could now be issued against him. It follows that if there is any liability on the part of John Smith to pay the citation fees it must be based on the citations issued against "John's Place."

An analogous situation was presented in the case of *May et al v. Clanton*, 208 Ala. 588, 95 So. 30 (1922). In this case the plaintiff sought to recover from the sheriff and his bondsmen damages for taking an automobile, the property of the plaintiff, under process against the Home Steam Laundry. The process issued in a cause entitled *H. O. Reno, a partnership, etc. v. Home Steam Laundry*; defendant not being otherwise described in the summons and complaint or judgment. The sheriff's return was as follows: "I have executed the within by handing a copy of same to Home Steam Laundry, served on Walter J. Clanton, Manager, * * * " In this case the court held the judgment having

been recovered in the name of a so-called defendant, Home Steam Laundry, a nonsuable entity, did not operate against its general manager, and was void, and that no parol evidence was admissible to show plaintiff's identity with the business as general manager. In the opinion by Justice Sayre the Court said:

"Had the former suit been brought against a suable entity, perhaps parol evidence would have been admissible to show his identity with this plaintiff. * * * But it does not appear that Home Steam Laundry was a suable entity. Home Steam Laundry was, we may assume, merely the name of a business conducted by plaintiff. Plaintiff was liable for all obligations incurred in the prosecution of that business; but, to enforce any such obligation, suit should have been brought against plaintiff in the only name by which he appears to have been known. * * * or was Home Steam Laundry a corporation."

The case further holds that Code 1907, Section 2506, providing that partnerships may be sued in their common name, does not authorize a suit against a party in the name only of an artificially designated business which he may use to identify, not himself, but his business.

In your illustration set out above "John's Place" is "merely the name of the business conducted by" John Smith. It is a trade name and not a suable entity, and in my opinion the citation is defective, and following the decision of the above set out case, would create no liability on John Smith to pay the citation fees. It follows, that since the citation issued to "John's Place" created no liability on the part of John Smith to pay the citation fees you are without authority to proceed against him criminally, nor have you any remedy against him to enforce the collection of the citation fee.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 3, 1942

Hon. Hamp Draper, Chief,
Division of Gins and Warehouses,
Department of Agriculture and Industries,
Capitol.

Warehouses—Warehousemen—Contracts—Belligerency—

1. Contracts of residents of the same sovereignty not affected by belligerency unless performance of contract gives aid or comfort to the enemy.

2. Liability of warehousemen for goods unaffected by belligerency.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your letter of January 12, 1942, in which you request an official opinion, is as follows:

"I would greatly appreciate your giving us a ruling regarding the obligations assumed by warehousemen under the State Warehouse Acts of Alabama concerning liability upon the warehouseman and surety company for acts of war, riot, civil commotion, invasion, sabotage, etc., which might preclude redemption of warehouse receipts."

The general rule with respect to the effect of war or belligerency as to the contracts of residents in the same sovereignty is set out in *Corpus Juris*, Vol. 67, page 349, as follows:

"§35. Right of Contracting Inter Se.—The right of persons resident in the same nation to contract between themselves, and the validity of their contracts, is not affected by the outbreak or existence of war between such nation and another, unless performance of the contract will necessarily give aid or comfort to the enemy, in which case it is void as to all acts to be done during the war."

The Alabama rule is in accord with the general rule above set out. In the case of **Morris & Blair v. Poillon**, 50 Ala. 403, it was held that the assignment of a note to a party not a public enemy was not forbidden and this would not defeat any right in the owner to transfer the note to any other person who could become its legal owner.

The general liability of a warehouseman is set out in Code of Alabama, 1940, Title 2, § 526, which is as follows:

"§ 526. Injury or loss resulting from negligence.—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

From the above section it can be seen that a warehouseman must exercise such care in regard to storing commodities or articles as a reasonably careful owner of similar goods would exercise. A warehouseman is not an absolute insurer of commodities or articles stored with him.

The above referred to Section 526 is merely declaratory of the common law on the subject, and makes the common law rule so enacted the statutory criterion of liability. **Tubbs v. American Transfer Co.**, 297 S. W. 670; **Minerva Mercantile Co. v. Cameron Compress Co.**, 15 S. W. 2d. 62.

The premises considered, you are advised that a warehouseman in Alabama, in the absence of any agreement to the contrary, would be liable for losses incurred by acts of war, riot, civil commotion, invasion, sabotage, etc.,

only in the event the warehouseman failed to exercise such care as a reasonably careful owner would exercise under the circumstances. **Bethea-Starr Packing & Shipping Co. v. Mayben**, 192 Ala. 542, 68 So. 814.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 4, 1942.

Hon. William F. Black, Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

Motor Carriers—Public Service Commission—

Fee of \$25.00 for transfer of certificate of public convenience and necessity or permit held not required of successor in interest of applicant for certificate of public convenience or necessity before said certificate or permit is granted by the Alabama Public Service Commission, provided the Commission enters an order permitting the transferee to intervene in the application for his transferor before the Commission for grant of certificate under "grandfather clause."—Code of Alabama, 1940, Title 48, Section 301(8).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion bearing date of November 5, 1941, is as follows:

"Under paragraph C of Section 30 of Alabama Motor Carrier Act of 1939 every application for transfer of a certificate of public convenience and necessity, or permit, is required to be accompanied by a fee of \$25.00. This transfer fee is provided for applications under Section 15 of the Act.

"Under Sections 8 and 11 of the same Act all operators in bona fide operation prior to the effective date of the Act are entitled to certificates or permits upon a showing that they were in bona fide operation prior to October 3, 1940. In other words operators entitled to the benefits of the provisions of the so-called "grandfather clauses" of Sections 8 and 11 of Alabama Motor Carrier Act of 1939 are not required to make a showing of convenience and necessity or consistency with the public interest before obtaining operating authority.

"Following the effective date of Alabama Motor Carrier Act of 1939 some four hundred operators filed applications with the Commission under the so-called "grandfather clauses" of the Act. Each of these applications is being made the subject of a public hearing. Necessarily it will take some time to hear and finally determine all of these applications. In fact it is doubted whether or not all applications will be disposed of before the end of 1942.

"H. L. Malone, an individual, was duly authorized by the Commission to operate as a common carrier of property over certain regular routes in Alabama under the provisions of Alabama Motor Carrier Act of 1931, which was repealed by Alabama Motor Carrier Act of 1939. This operator, under the provisions of Alabama Motor Carrier Act of 1939, filed a "grandfather clause" application with the Commission within 120 days after the effective date of the 1939 Act. This application has not yet been heard by the Commission and in the ordinary course of affairs probably will not be heard before about February or March, 1942. H. L. Malone has now entered into an agreement with Malone Freight Lines, Inc., by the terms of which the latter will purchase all operating authority of the former in Alabama, subject to the approval of this Commission. It appears under the provisions of the "grandfather clause" of Section 8 of Alabama Motor Carrier Act of 1939 the corporation is entitled to succeed to the right of the individual and claim a certificate of public convenience and necessity by reason of the operations of its predecessor. This right is recognized by the Commission and we have entered an order permitting the corporation to enter upon the operations previously carried on by the individual. Of course, since H. L. Malone does not now hold a certificate or permit under the 1939 Act, no certificate or permit can be transferred. The question then arises; Should the Commission require the payment of the transfer fee set forth in Section 30, Paragraph C, of Alabama Motor Act of 1939 in connection with the proceeding before the Commission wherein it authorized the corporation to enter upon the operations previously carried on by the individual?

"It is expected that a good many sales of this character will be made before the final determination of all applications filed under the so-called "grandfather clauses" of the 1939 Act. We will, therefore, appreciate an official opinion on the question of whether or not the transfer fee should be paid in a proceeding of this character."

In reply I wish to refer to Section 301 (8) of Title 48, of the Code of 1940 which provides in part as follows:

"§ 301 (8). **Certificate of convenience and necessity.**—A. Except as otherwise provided in this section no common carrier by motor vehicle subject to the provisions of this article shall engage in intrastate commerce on any highway in this state unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this article, authorizing such operation; provided, however, that subject to section 301 (12) of this title, if any such carrier of property, except common carriers of passengers by motor vehicle, or predecessor in interest was in bona fide operation as such common carrier of property by motor vehicle prior to the ef-

fective date of this article, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation prior to article during the season ordinarily covered by its operation, except in either instance as to interruptions in service over which the applicant or its predecessor in interest had no control, the commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the commission as provided in paragraph B of this section, and within one hundred twenty days after this section shall take effect."

You are further referred to Section 301 (30) of said Title 48 of the Code of 1940, which provides in pertinent part as follows:

"§ 301 (30). **Fees.**—In addition to all of the taxes and fees prescribed by law, motor carriers shall pay to the commission under the provisions of this article the following: A. Every application for a certificate of public convenience and necessity or permit under this article except applications of motor carriers or predecessors in interest, in bona fide operation prior to the effective date of this article which are filed under the provisions of sections 301 (8) of this title A and 301 (11) of this title A hereof shall be accompanied by an application fee in the amount of ten dollars. *** C. Every application for transfer of a certificate of public convenience and necessity, or permit shall be accompanied by a fee of twenty-five dollars."

You will note that according to the above quoted provisions of the Code of 1940, that not only the motor carriers who were in operation prior to the effective date of this article are entitled to the certificate of public convenience and necessity or permit here provided for without payment of a fee but their successors in interest who shall also apply within the time prescribed by law are, likewise, entitled to the issuance of said certificate or permit without charge, upon a finding of the commission that such certificate or permit shall under the provisions of the law be issued. It is to be noted that no certificate or permit has been granted to applicant H. L. Malone and prior to the date of consideration of application by the Alabama Public Service Commission, Mr. Malone has transferred whatever right he may have to ask for the certificate to the Malone Freight Lines, Incorporated. It must, therefore, follow that the Malone Freight Lines have acquired nothing more than whatever H. L. Malone, an individual, had to offer, which, in the instant case, is an application for a certificate or permit of public convenience and necessity.

In my opinion, Subsection C, of Subsection 30, of Section 301, of Title 48 of the Code of 1940, quoted supra, has no application to this set of circumstances and the \$25 there provided, of necessity, cannot be held to be applicable. The language of the statute is clear in holding that a **transfer of a certificate** of public convenience or necessity or **permit** shall be accompanied by a fee of \$25, but no mention is made of the transfer of an application or any future rights, which may accrue under an application for such certificate or permit to the Public Service Commission. When the language of a statute is clear, no construction may be had. **H. G. Fain v. State**, 23 Ala. App. 239, 124 So. 119.

The quoted provision of the Alabama Code, *supra*, is substantially similar to Section 206 (a) of the Federal Motor Carrier Act of 1935.

The Interstate Commerce Commission, in construing the federal law as applied to a similar situation, in **No. MC-F-112—Watson Bros. Transp. Co., Inc.—Purchase—Jacob J. Lesser**, 15 M. C. C. 581, said:

"No. MC-F-242—Packer, in pending 'grandfather' application No. MC-68527, as amended, claims rights over routes in Nebraska, approximately 193 miles, between Lincoln and Fairbury via Beatrice, Wymore, and Steele City and via Crete and Wilber, and between Beatrice and Fairbury via Ellis and Jansen. The route via Beatrice and Wymore, approximately 92 miles, duplicates a route claimed by applicant. On January 6, 1937, rights over the described routes were assigned by Packer to applicant in consideration of assignment to him by the latter of rights claimed by it between Fairbury and Alma, Nebr., approximating 130 miles, via Hebron and Red Cloud, including service to off-route points. The Fairbury-Alma rights are a portion of those involved in No. MC-F-118, *supra*.

"Our approval of the assignment to Packer is not sought. That transaction does not appear to be within the scope of section 213, and Packer and applicant should file appropriate application seeking substitution of the former in lieu of the latter as applicant for certificate or permit to operate as a motor carrier between Fairbury and Alma to the extent operating rights between those points are confirmed under the original 'grandfather' application of Service Transfer."

So that, in my opinion, if an order is entered in the application of H. L. Malone, an individual, for the grant of a certificate of convenience and necessity under the "grandfather clause" of the Alabama law, allowing his transferee, Malone Freight Lines, Inc., to intervene and to be substituted as applicant therein, the Alabama Public Service Commission may proceed to hear and determine the application at the instance of the substituted applicant, and, if upon hearing it determines that the substituted applicant is entitled to the issuance of certificate by reason of its status as transferee of the original applicant, a certificate may be issued to it, the substituted applicant, without the payment of the \$25 transfer fee.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 5, 1942.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Elections—Alabama Beverage Control Act—

1. Under Code of Alabama, 1940, Title 29, Section 68, a petition, seeking an election in a county to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed therein, signed by the requisite number of qualified electors, is "filed with" the probate judge of said county on the date the same is presented to him, and not on the date when he ascertains that the same contains the signatures of the requisite number of qualified electors.

2. The probate judge must order an election for such purpose "within not less than thirty days, nor more than forty-five days," from the date on which such petition is presented to him, rather than "within not less than thirty days, nor more than forty-five days" from the date on which he ascertains that said petition contains the signatures of the requisite number of qualified electors.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of December 5, 1941, is as follows:

"Title 29, Section 68, Code of 1940, in the latter paragraphs of said section provides that 'Said election shall be held within not less than thirty days, nor more than forty-five days, from the date of filing said petition ***.'

"Your office has already ruled that the voters signing such petition must be qualified voters, and that it is the duty of the Judge of Probate to investigate, before he orders an election, whether the signers are qualified voters. It is important therefore to determine when the petition is fileable, or 'filed', in connection with fixing the date for the election. In some circumstances it might take more than thirty or even forty-five days for the Judge of Probate to check the names on the paper brought to him, to ascertain whether the signers comprise a sufficient number of qualified voters to meet the legal requirements.

"Please advise whether the 'date of filing' means the date on which the movants first bring the paper to the Judge of Probate, or does it mean the date on which the Judge of Probate ascertains and determines that the petition contains the requisite number of qualified signers?"

The provisions of Code of Alabama, 1940, Title 29, Section 68, pertinent to your inquiry, read as follows:

“ *** Any county in the state may change its classification from wet to dry or from dry to wet, under this chapter in the following manner: **Upon the petition of twenty-five percent of the number of voters voting in the last preceding general election being filed with the probate judge of said county, said probate judge must call an election for said county to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in said county. *** Said election shall be held within not less than thirty days, nor more than forty-five days, from the date of filing of said petition and notice thereof shall be given by the probate judge by publication at least three weeks before the date of said election, in a newspaper in the county or, if there be none, by posting such notice at the court house apprising the voters of the county that an election will be held in the several precincts thereof, to determine whether such county shall be wet or dry under the alcoholic beverage control law. ***** ” (Emphasis supplied)

As stated in your letter of inquiry, this office has held that the persons signing the petition provided for in the above-quoted excerpts from Section 68, supra, must be qualified electors; and that it is the duty of the probate judge to determine whether or not the signers of the petition are qualified electors, and whether or not the petition contains the signatures of the requisite number of qualified electors, i. e., twenty-five percent of the number of voters (qualified electors) voting in the last preceding general election. See opinions to Hon. Chester A. Walker, Judge of Probate, Tuscaloosa County, Tuscaloosa, Alabama, under date of April 8, 1940, Quarterly Report, Attorney General, Vol. XIX, page 24, and to Hon. J. F. Laseter, Judge of Probate, Barbour County, Clayton, Alabama, under date of September 22, 1941, Quarterly Report, Attorney General, Vol. XXIV, page 231.

In my opinion, such a petition is “filed with” the probate judge on the date the same is presented to him, and not on the date when the probate judge ascertains that the same contains the signatures of the requisite number of qualified electors. Apt authority for this conclusion is found in the case of **King v. Central Hardware Co.**, 17 Ala. App. 347, 85 So. 821, cert. granted 204 Ala. 336, 85 So. 822. In that case one of the questions decided was whether or not an application for rehearing was “filed with the clerk” of the Court of Appeals within fifteen days after the rendition of the judgment of the Court of Appeals, in conformity with the provisions of Supreme Court Rule 38. The facts showed that the application for rehearing was received by the clerk of the court on the fifteenth day after the rendition of the judgment, though after office hours, but that the endorsements on the record showed that the same was “filed” on the sixteenth day after the rendition of the judgment. It was held that the same was “filed with the clerk of the court” on the fifteenth day after the rendition of the judgment, since he received the same on that day, though after office hours, notwithstanding the fact that the endorsements on the record showed that the same was “filed” on the sixteenth day after the rendition of the judgment. The granting of certiorari by the Supreme Court was on other grounds.

To like effect are numerous definitions found under the heading of "File" in Words & Phrases, Permanent Edition, Vol. 16, pp. 531-560, and the heading of "Filing of Papers" in the same volume of the same work at pp. 566-567. I here quote a few of these definitions:

"A paper is 'filed' when it is delivered to the proper officer and by him received to be kept on file. *McIntosh v. Palmer*, 48 P. 2d 815, 173 Okl. 367."

"A paper is 'filed' when delivered to proper officer and received by him to be kept in his official custody. *Coult v. McIntosh Inv. Co.*, Fla. 182 So. 594, 600."

"'Filing' of a paper or document is the delivery thereof to the proper officer and lodged by him in his office. *Young v. U. S., D. C., Idaho*, 5 F. Supp. 500, 501."

"A paper is in legal effect 'filed' when it is delivered to proper officer and by him received to be kept on file; deposit with proper officer is the thing essential, of which the filing is but evidence. *McGregor v. Village of Lovington*, 48 Ill. App. 202."

"Clerk's omission to make proper indorsement on paper left with him does not prejudice rights of party filing it, since placing of paper legally entitled to be filed in official custody of clerk is 'filing' thereof, and official file mark merely evidences fact of filing. *Blackburn v. State ex rel. Echols*, Tex. Civ. App., 72 S. W. 2d 627, 629."

The above definitions are found at page 537.

"'Filing of papers' is accomplished by depositing with proper officer at place for performing duties paper to be filed. *People v. Ramirez*, 297 P. 51, 52, 112 Cal. App. 507."

"The 'filing' of a paper is the delivery of it to the officer at his office, to be kept by him as a paper on file, and the file mark of the officer is evidence of 'filing,' but it is not the essential element of the act. *Masterson v. Southern R. Co.*, Ind. App. 82 N. E. 1021, 1023; *Bade v. Hibberd*, 93 P. 364, 365, 50 Or. 501, citing *McDonald v. Crusen*, 2 Or. 258; *Conant's Estate*, 73 P. 1018, 43 Or. 530; *Goodwin v. Bickford*, 93 P. 548, 551, 20 Okl. 91, 129 Am. St. Rep. 729, citing *Wescott v. Eccles*, 2 P. 525, 3 Utah 261; *City of Pekin v. Dunkelburg*, 40 Ill. App. 184; *Todd v. Peterson*, 81 P. 878, 880, 13 Wyo. 513; *Day & Congleton Lumber Co. v. Mack*, 69 S. W. 712, 714, 139 Ky. 587."

"Leaving or depositing of referendum petitions for submission of ordinance to qualified electors with secretary to mayor in office of mayor held sufficient 'filing' of petitions with chief executive officer as required. 34 Okl. St. Ann. §§52-54. Instrument is 'filed' for record when it is deposited in proper office with a person in charge thereof, with directions

to record it; act of leaving or depositing paper in proper office constitutes 'filing' of it within statute providing therefor. There can be no 'filing' of a paper in a legal sense, except by its delivery to an official whose duty it is to file papers and who is required to keep and maintain an office or other public place for their deposit, and the paper must either be delivered personally to such officer with the intent that the same shall be filed by him or delivered at the place where the same should be filed. *State ex rel. Hunzicker v. Pulliam*, 37 P. 2d 417, 168 Okl. 632, 96 A. L. R. 1294."

These definitions are found at page 566.

Since the above-quoted excerpts from Section 68, *supra*, require the election to be held "within not less than thirty days, nor more than forty-five days from the date of filing of said petition," it follows that the same should be held on a date "within not less than thirty days, nor more than forty-five days" from the date on which the same is presented to the probate judge, and not on a date "within not less than thirty days, nor more than forty-five days" from the date on which the probate judge ascertains that said petition contains the signatures of the requisite number of qualified electors.

Since the above-quoted excerpts from Section 68, *supra*, require the probate judge to give notice of the election "by publication at least three weeks before the date of said election, in a newspaper in the county or, if there be none, by posting such notice at the courthouse," it becomes necessary for you to check the petition and ascertain whether or not same contains the signatures of the requisite number of qualified electors a sufficient length of time before the date on which the election is to be held (a date "not less than thirty days, nor more than forty-five days" from the date on which the petition is presented to you) to enable you to give such notice.

I realize that the result of this holding means that the probate judge will have a comparatively short period of time in which to check the petition and ascertain whether or not the same contains the signatures of the requisite number of qualified electors. However, that is a matter which addresses itself to the Legislature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 6, 1942.

Hon. John D. Petree,
Director of Industrial Relations,
Capitol.

Department of Industrial Relations—Board of Mine Examiners—
Payment of Expenses— Special Funds—

1. The expenses of the Board of Mine Examiners is not payable out of the \$15,000 appropriated to the Department of Industrial Relations by Act 599.
2. Payment of the expenses of the Board of Mine Examiners discussed generally.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

We have your request, under date of January 13, 1942, for official opinion, which is as follows:

"Under the provisions of the Code of Alabama, 1940, Title 26, Section 53, there is created a Board of Examiners who shall examine and give certificates of competency to persons to act as mine foremen or fire bosses in any coal mine in Alabama. The Chief of the Division of Safety and Inspection of the Department of Industrial Relations serves as ex officio chairman (Title 26, Sections 31 and 53) and the records of the meetings and transactions of the Board and all certificates issued are preserved in the office of the Department. These facts show how closely related are the functions of this Board and the Department with respect to safety in coal mines.

"An applicant for examination for mine foreman certificate pays a fee of \$5.00 and an applicant for fire boss certificate pays a fee of \$3.00 (Code of Alabama, 1940, Title 26, Section 54) and such money is used as an Examiners' Fund and the compensation of the examiners is paid out of this fund. (Code of Alabama, 1940, Title 26, Section 55). If a certificate is lost or destroyed, the Department will supply a duplicate upon the payment of \$1.00 (Title 26, Section 60.)

"Prior to September 30, 1940, the money received from the applicants and from persons desiring duplicate certificates was maintained as a Mine Examiners' Fund under the direction of the Chief of the Division of Safety and Inspection and on deposit in a Birmingham, Alabama, bank. At the end of the term of a chief of the Division of Safety and Inspection, the remainder in the fund was paid over to his successor. Upon the request made by A. R. Forsyth, Director of Finance, \$900.00 was paid to the General Fund for the State and a separate account was set up in

the Office of the State Treasurer to be known as the Mine Examiners' Account.

"In October, 1941, the Board of Examiners conducted an examination for mine foremen and fire bosses and \$206.00 was collected from the applicants for these examinations. The total cost of conducting the examination amounted to \$276.00. The balance of \$70.00 remains unpaid. The director of Finance was requested to make available funds in the amount of \$70.00 for the payment of these expenses. He replied by stating that he is of the opinion that this deficit of \$70.00 can be charged to the special appropriation of \$15,000.00 which was made to the Department of Industrial Relations at the closing days of the last Legislature.

"I desire your opinion relative to the authority of this Department to use the funds of the Department for the payment of expenditures such as the \$70.00 expenses incurred by the Board of Examiners in conducting the examinations for mine foremen and fire bosses. I also desire your advice as to the correctness of the transaction by which funds of the Mine Examiner's Account maintained by the Department was paid into the general fund of the State. As I have stated, the \$70.00 deficit remains due and unpaid and demands are being made upon the Department for this amount. In view of these circumstances, I will appreciate your giving consideration to this request at your very earliest convenience."

In reply to your first inquiry, you are advised that in my opinion the \$70.00 expense item incurred by the Board of Examiners may not be paid from the \$15,000 appropriation made to the Department of Industrial Relations by Act 599, H. 922, approved July 28, 1940, General Acts, 1939, p. 967. Section 1 of this Act reads as follows:

"§ 1. That there be and is hereby appropriated to the Department of Industrial Relations out of any funds in the State Treasury not otherwise appropriated for each of the fiscal years ending, respectively, September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, the sum of Fifteen Thousand and no/100 (\$15,000) Dollars, which shall be used for the purpose of further bearing the expenses of the Department of Industrial Relations in administering the Workmen's Compensation Act of Alabama, and the program of factory and industrial plant inspection for the safety of employees and the prevention of accidents, it being one of the purposes of this program to reduce compensable accidents in Alabama, thereby reducing Workmen's Compensation Insurance rates in this State."

It will be noted from the above quoted section of Act 599, supra, that the \$15,000 thereby appropriated was for the purpose of bearing the expenses of the Department of Industrial Relations in the administration of the Workmen's Compensation Act, and the program of factory and industrial plant inspection for the safety of employees and the prevention of accidents. In my judgment, it could not be said that the \$70.00 expense item incurred by the Board of Examiners would properly come within the purview of this act, since the Legislature has dealt specifically with the expenses of the Board of Examiners, as will be hereinafter pointed out.

In reply to your second inquiry in connection with the transfer of the \$900 mentioned in your request, which said sum has been transferred to the general fund of the State of Alabama, you are advised as follows:

Section 54 of Title 26, Code of 1940 reads as follows:

"§ 54. Fee paid by applicant.—A fee of five dollars shall be paid to the department by each person examined for mine foreman certificate and three dollars for fire boss certificate, to be used as an examiners' fund, before examination is begun.

Section 103, Title 55, Code of 1940 reads in pertinent part as follows:

"§ 103. Departmental and institutional receipts.—All fees, receipts, and income collected or received by any department, board, bureau, commission, agency, or office or institution of the state shall be paid into the state treasury or deposited in an approved state depository to the credit of the general fund of the State of Alabama or to the credit of a special fund if the latter is required by law. No such payment or deposit shall be subject to withdrawal by any such department, board, bureau, commission, agency, office, or institution, and, all appropriations made to any such department, board, bureau, commission, agency, office or institution shall be specified amounts and shall be subject to allotment as herein above provided."

It appears from the above quoted code section that all fees, receipts, and income collected or received by any board or bureau of the State of Alabama shall be paid into the State treasury or deposited in an approved depository to the credit of the general fund of the State of Alabama, or **to the credit of a special fund if the latter is required by law.**

It is my opinion that the provisions of Section 54 of Title 26 create a special fund of the fees paid to your department by applicants for examination for mine foreman certificates and fire boss certificates, and directs that these fees be credited to a special fund in the state treasury, and not to the general fund of the state.

It is true that the provision is made in Section 103 that the fees collected by any bureau or board shall not be subject to withdrawal by any such bureau or board. In my opinion, the above restriction on the withdrawal of funds is applicable to the manner of the disbursement of such funds, and is not a restriction upon the use of such funds.

Therefore, since the Legislature has provided by Section 54, Title 26, *supra*, that these fees shall be used as an examiner's fund, you are advised that in my opinion the \$70.00 expense item referred to by you may be paid out of this fund. The method of payment should be by requisition to the comptroller to draw his warrant against this fund for the payment of this item.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 6, 1942.

Hon. W. D. Partlow, M. D.,
Superintendent,
The Alabama State Hospitals,
Tuscaloosa, Alabama.

Code 1940, Tit. 45 § 189-190—Alabama State Hospitals—Searcy Hospital—

Lands and improvements thereon granted to State by Act of Congress, approved March 1, 1895 (28 Stat. 701) and set apart by State for use of the Mount Vernon Hospital, in Mobile County may not be sold or conveyed by the Board of Trustees of Alabama State Hospitals under Code 1940, Tit. 45 § 190.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 13, 1941 follows:

"Please accept my personal thanks and that of the Board of Trustees for the prompt attention you gave my request for an opinion relative to the Board's authority for granting rights-of-way.

"Generally, it was understood that they had such authority, but some members of the Board wanted on file your opinion leaving no question as to that authority.

"Although the question about to be raised by me has no immediate connection with the question which you have so succinctly and lucidly answered, yet it has a bearing on other matters pertaining to the institution. I am referring to page 2, first paragraph of your opinion following quotation of my question, in which you state 'The Board of Trustees of the Alabama State Hospitals is vested with the possession and control of all property belonging to The Bryce Hospital at Tuscaloosa and The Searcy Hospital in Mobile County, with power to sell and convey any real property of the Hospitals.'

"My understanding is that the Board has such authority in reference to all properties belonging to The Bryce Hospital, but the lands belonging to the Searcy Hospital in Mobile County came through a grant of the U. S. Government by Act of Congress to the State on the condition that the property be used for public purposes and my understanding of the Act conveying these properties to the hospitals was necessarily with the same reservation, therefore, my understanding has been until noting this in your opinion, that the Board only had authority to use the lands for hospital purposes and had no authority to sell the lands to private individuals. It is my understanding that the Board has authority to pass title of any of the lands.

"Apologizing for raising this question which is beside the original question, but is suggested in the first paragraph of your opinion on page 2,—and trusting you may give the last question relative to The Searcy Hospital property at Mt. Vernon, Alabama your separate consideration."

The lands above referred to as belonging to the Searcy Hospital in Mobile County were granted by an Act of Congress approved March 1, 1895 to the State of Alabama for public uses to be held and used for public purposes and were formerly known as Mount Vernon Barracks Military Reserve. 28 Stat. 701.

By an act approved December 5, 1900 the Legislature of Alabama appropriated money to be used for the improvement of said lands for use by the Alabama Insane Hospitals (Act of Alabama, 1900-01), page 64.)

By Act No. 147, S 4, approved December 11, 1900 (Acts of Alabama 1900-01 page 358) said Alabama Insane Hospitals were duly incorporated and said lands were "set apart for the use of the insane of the State under the name of the Mount Vernon Hospital."

The name of the Mount Vernon Hospital was thereafter changed to Searcy Hospital (Acts 1919, page 885).

The words "set apart" have been construed as synonymous with dedicate and import merely a segregation or separation of one lot of land from another lot when used in this connection with land. These words are not sufficient to divest title in such lands or to operate as a present conveyance of title. **Yellowstone Park Transportation Company v. Gallatin County**, 27 F. 2 d. 410, 411; **Yoakum County v. Slaughter**, 195 S. W. 1129, 1131, 109 Tex. 42.

I, therefore, conclude that title to the lands in question remains in the State of Alabama, which holds said lands in trust for public uses and purposes and that the Board of Trustees of Alabama State Hospitals is without authority or power, under Code of 1940, Title 45, Section 190, to sell or convey said lands, although, of course, under the present terms of Act No. 147, supra, said Board is authorized to use the lands for hospital purposes for the use of the insane of the State. 50 C. J. 960 (7).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol,
Montgomery, Alabama.

Taxation—Exemption—Railroads—

Where the gross receipts of a railroad derived from handling mail and express cannot be separated as to interstate and intrastate business, the Department of Revenue is not authorized to adopt a formula for this purpose. (Title 51, Section 180, Code of Alabama, 1940.)

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion, bearing date of January 31, 1942, is as follows:

“Re: Taxation—Exemption—Railroad Title 51, Section 180, Code of Alabama 1940 (Railroad Cross Receipts Tax)

“This will refer to your opinion of March 6, 1941, on the above mentioned subject.

“As a result of conferences and hearings upon assessments entered against various railroads since the receipt of your opinion, and which matters are still pending, the following additional questions have arisen which are submitted for your consideration, namely:

“It appears that the compensation received by the railroads from the United States for the transportation of United States mail includes both interstate and intrastate transportation of mails; and the railroads claim to be unable to determine what portion of such receipts are derived from intrastate business or transportation.

“Also, it appears that the express business is conducted by a separate operating express company, under contract with the railroads, a copy of which contract is submitted for your examination; and the railroads claim to be unable to determine what portion of their receipts under such contract are derived from intrastate business, as the contract covers operations both interstate and intrastate. The operating express company pays the gross receipts tax imposed upon such business under Section 184 and 185, Title 51, Code of Alabama 1940.

“In view of the foregoing, your further opinion is requested as follows:

“If mail or express revenue received by the railroads may not be separated in such manner as to determine the amount or portion thereof

derived from intrastate business, please advise whether the Department is authorized to adopt and enforce any method or formula for allocating any portion of such revenues to intrastate business."

It is my opinion that if the receipts of a railroad from the transportation of United States mail, or from its contract with the operating express company may not be separated by the railroads in such manner as to determine and report the amount thereof derived from intrastate business, the Department is not authorized to make such determination by the adoption of any method or formula for the allocation of any portion thereof to interstate business.

Section 886, Title 51, Code of Alabama, 1940, contains provisions requiring the taxpayer to keep an accurate set of books showing the nature and details of a business, which shall be sufficient to fully disclose the information necessary to determine the correct amount of any tax. However, the statute makes no provision requiring the railroad to separate intrastate receipts from interstate receipts by any method of allocation; and the statute contains no provision authorizing the State Department of Revenue or the Commissioner of Revenue to adopt or enforce any method or formula for the determination of intrastate receipts by allocation, where the item of revenue involved includes both interstate and intrastate business. See *People, ex rel. New York Central & H. R. R. Co. v. Morgan*, 60 N. E. 1041 (New York).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 10, 1942.

Hon. H. W. Phillips, Clerk,
Circuit Court, Dale County,
Ozark, Alabama.

Trial tax—Costs and fees—

Every case, civil, criminal or equity, which is docketed in any circuit court in this state, carries a trial tax of \$3.00, unless specifically exempt. This is true although the case is one over which the circuit court has no jurisdiction.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 4, 1942, in which you request an official opinion, is as follows:

"I would like very much to have your opinion on the following question.

"According to the 1940 Code, Title 51, Section 20, all cases docketed in circuit court, except as provided for, there is a \$3.00 trial tax that must be collected along with other costs. Now as the circuit court does not have jurisdiction in a civil suit for less than \$50.00, and there have been cases docketed in circuit court erroneously for less than \$50.00, is there a trial tax due to be collected along with the sheriff's and clerk's costs in cases so filed?"

I am unable to tell from your request just how these cases were improperly placed on the docket and the reason for it. However, it is my opinion such cases carry a trial tax. You will note that Title 51, Section 20, Code of 1940, says in part:

"A trial tax of \$3.00 is imposed on each case, civil, criminal and equity, which is docketed in the circuit court in this state."

You will note that this section does not say a trial tax of \$3.00 is imposed in each case, civil, criminal and equity which is docketed in the circuit court in this state where this court has jurisdiction. As it appears, there is no question of jurisdiction involved. It is just a matter of going on the docket, and as soon as it does, the trial tax attaches. Cf. Quarterly Report of Attorney General, Volume XXI, page 58. Of course, I am mindful that there are certain exemptions from such tax, but certainly this does not apply here.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 10, 1942.

Hon. William G. Lindsey,
County Solicitor,
Washington County,
Chatom, Alabama.

Officers and Offices

1. Member of County Democratic Executive Committee does not hold an office within the purview of Code of 1940, Title 12, Section 7.

2. Member of county commissioners court may also be member of County Democratic Executive Committee.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion, bearing date of January 28, 1942, is as follows:

"Please give me your opinion on the following:

"Can a member of the County Board of Commissioners legally serve as a member of the County Democratic Executive Committee, from his precinct, during his term of office as such Commissioner?"

It is my opinion that your inquiry must be answered in the affirmative.

In an opinion of this office, directed to Hon. C. R. Dudley, Chairman, Board of Equalization, Russell County on February 28, 1940, Quarterly Report of the Attorney General, Volume 18, page 285, it was held that a member of a County Democratic Executive Committee did not hold an **office of profit**. Therefore, clearly Section 280 of the 1901 Constitution does not prevent a member of a county court of commissioners from serving as a member of a County Democratic Executive Committee.

However, Code of 1940, Title 12, Section 7, provides as follows:

"§ 7. (6750) (3308) (953) (821) (741) (827) (699) **Commissioners ineligible to certain offices.**—No county commissioner is eligible to or must discharge the duties, either as principal or deputy, of any other office."

Therefore, the question of whether or not a member of a County Democratic Executive Committee holds an office within the purview of Section 7, *supra*, is presented.

Offices broadly speaking are of two types, public and private. **Commonwealth v. Christian**, 9 Phil. 556; **Polk v. James**, 68 Ga. 128. However, "'Office' in the common use and meaning of the word is a public charge or position that may be held with federal, state, or a municipal government, and is executive, judicial and legislative in character." **Lamar v. Splain**, 42 App. D. C. 300.

It is my opinion that the word office as used in Section 7, *supra*, undoubtedly has reference to public office rather than private office. Certainly it was not the legislative intent to prohibit a member of a commissioners court from being president of his Sunday-school class or of his civic club.

It is well settled in Alabama that a political party is not a governmental agency. In **Smith v. McQueen**, 232 Ala. 90, 166 So. 788, the Supreme Court said:

"This general principle was recognized by this court in **Lett v. Dennis**, 221 Ala. 432, 129 So. 33, 35, where it was observed that political parties are not governmental agencies, but voluntary organizations with the objects 'intimate to those who compose them.'"

In my opinion a member of a County Democratic Executive Committee is a party officer rather than a public officer. In 29 C. J. S., Elections, Section 85, it is said:

"Officers of a political party, although provided for by statutory law, may not be regarded as public or governmental officers. So, the position of party committeemen is not usually regarded as constituting a public office, under the view that such position is merely a party position, carries with it no salary, fees, or emoluments, and such committeemen represent the members of political parties, are accountable to them alone, are not required to qualify as are other officers, and do not represent the public at large or exercise any of the sovereign powers of the state."

In 18 American Jurisprudence, Elections, Section 139, it is said:

"§ 139. **Committeemen as Public Officers.**—It is generally agreed that party committeemen do not become public officers by reason of the fact that they are elected at a statutory primary election, because the duties of a public office are in their nature public; that is, they involve in their performance the exercise of some portion of the sovereign power, whether great or small, in the performance of which all citizens, irrespective of party, are interested, either as members of the entire body politic or of some duly established division of it. Manifestly, membership in a political committee belonging to one party or another does not come within the above description of what constitutes public office, and the fact that the legislature undertakes by statute to regulate the election and conduct of political committees does not make the office a public one. The members thereof continue to be, as before, officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong and which alone is interested in their proper performance. *** "

In fact a distinction between "party office" and "public office" was recognized by the Alabama Legislature in the Merit System Act, which has been codified as Sections 293-327 of Title 55 of the 1940 Code, wherein it provides in Section 317 as follows:

"No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Since the definitions set out in Code of 1940, Title 17, Section 412 apply only to Chapter 20, Title 17, this opinion does not in any way conflict with an opinion of this office rendered March 31, 1938 to Hon. Joe M. Pelham, Judge of the Circuit Court, Washington County, Biennial Report of Attorney General, 1936-38, page 602.

The premises considered, it is my opinion that a member of a County Democratic Executive Committee does not hold an office within the purview of Code of 1940, Title 12, Section 7, and therefore such position may be held by a member of a county governing body.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 10, 1942.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Bailiffs—Circuit Courts—Mobile County—

1. Under Section 187, Title 13, Code of Alabama, 1940, the Circuit Judges of Mobile County have the authority to appoint bailiffs to serve at their pleasure at a salary of \$2400.00 per annum.

2. Under this provision of the Code the Sheriff does not have the authority to appoint bailiffs for the circuit court.

3. The authority for appointing bailiffs under Section 186, Title 13, Code of 1940, is not applicable to Mobile County.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of January 12, 1942, in which you request my official opinion as follows:

"In connection with an audit of the Board of Revenue and Road Commissioners, Mobile County, for the period 1940-41, it is felt that an Attorney General's opinion is necessary relative to the following:

"Several claims have been presented for payment covering hire of extra bailiffs for the court. One such claim being approved and audited by the Board, and the rest presented directly to the Treasurer, all of which were paid. The total amount involved is approximately \$912.00.

"The history of these claims is herewith set out: On May 11, 1941, the minutes of the Circuit Court recite the following:

"In the matter of the appointment of an additional Bailiff for the Circuit Court.

"In the opinion of the Judges of the Circuit Court, it is necessary to have an additional bailiff to those now serving during the remainder of the session cases being heard by Juries.

"It is, therefore, ordered that the Sheriff shall furnish a (*italics supplied*) Bailiff for use in said Court in addition to the three Bailiffs now serving in the respective divisions.'

"(Signed by each of the three Judges).

"Attached to the claims paying for said bailiff's hire are:

"1. Certification by the Sheriff that two Bailiffs were appointed under authority of the above.

"2. Certification of Circuit Clerk that Court was held on various dates.

"3. Certification by Bailiff payee that he served various enumerated days.

"4. Certification by each of the Judges in whose division an extra bailiff served as follows:

"To George E. Stone, Treasurer, and Mobile County.

"I _____ a Judge of the Circuit Court of _____ County, do hereby certify that, under provisions of Section 6716 and 6717 of the 1923 Code, as amended, _____ served as a bailiff in the Circuit Court of _____ County on the following days:

"1939. Sept. 1-2

Oct. 3-4-5-6-10-11-13-17-18-19-20-24-25-26-27-31.

Nov. (dates enumerated)

Dec. " "

1940 Jan. (dates enumerated)

Feb. " "

March " "

April " "

May " "

June " "

July " "

Aug. " "

"I further certify that the Sheriff of _____ County was directed by this Court to summon two bailiffs to act in said Court and that the Sheriff summoned _____ as one of such bailiffs. I further certify that said bailiff actually attended Circuit Court in _____ County on the foregoing dates and that his services were actually necessary during said time.'

(Signed) _____

Judge.

"It may be noted that the claim was filed in 1941 for a total of 149 days services rendered in 1939 and 1940, and at a rate of \$3.00 per day. It is further noted that the order of May 11, 1941, was not in effect during the period for which compensation was paid this bailiff. Information furnished by the Examiner is to the effect that the two extra bailiffs appear on the payrolls as Deputy Sheriffs one drawing compensation at \$125.00 per month and the other at \$50.00 per month.

"Reference is made to *State ex rel Farmer v. Haas*, 196 Southern, page 873, wherein the same person employed as one of the extra bailiffs, had entered mandamus against the Chairman for salary as an extra bailiff at a greater sum than the \$3.00 per day subsequently paid him on the above mentioned claim.

"The Treasurer advised the writer that he paid the above type of claims because the Court ordered him to do so.

"In the light of Title 13, Sec. 187, et seq., I, herewith, ask for your opinion on the following:

"1. Can the Treasurer of Mobile County legally pay claims of this type?

"2. If so, can services rendered in 1939 and 1940 be paid by warrant covering a claim made in 1941?

"3. Can the Court or Courts authorize the employment of more than three bailiffs at any one time? (Mobile County)

"4. If more than three bailiffs can be employed, should any number over three be paid on a per diem basis of \$3.00 or by monthly salary?"

The answer to your questions, in my judgment, can be found in a study of Sections 186 and 187 of Title 13, Code of Alabama, 1940, the history of these sections as amended from time to time, and the decisions of our Supreme Court in construing them. The study should begin with the Code of Alabama, 1907, where these sections then appeared as Sections 3264 and 3265, respectively, and which read as follows:

"3264. Bailiffs, constables, or deputies to attend court.—The sheriff of the county must summon three bailiffs, constables, or deputies to attend at each term of the circuit court, and may, on order of the court, entered on the minutes, summon additional deputies; and should any one of them fail to attend, a conditional judgment may be entered against him of ten dollars, which must be made absolute, unless he appears at the next term and shows a good excuse for not attending."

"3265. Compensation to such constables.—Such constables or deputies attending receive two dollars for each day's attendance, to be paid out of the county treasury, on the certificate of the clerk, showing the number of days they have attended."

Before proceeding further, I think it should be noted that under the Code of 1907 every circuit court in the State was on the same basis so far as employing and paying bailiffs was concerned. It will also be observed that they were summoned by the sheriff when ordered by the court, and that their rate of pay was \$2.00 per day.

Both of these 1907 Code sections were amended in 1915 and 1919 (General Acts, 1915, p. 707), (General Acts, 1919, p. 1113), and, as amended, became Sections 6716 and 6717 of the Code of Alabama, 1923, and read as follows:

"6716. Bailiffs, constables, or deputies to attend court.—The sheriff of the county must summon one person to serve as bailiff for the grand jury; one to serve as bailiff in every circuit court, or division thereof, in which cases are being tried without juries when directed by the judge; and not exceeding four to serve in every court, or division, in which cases are being tried by juries, when the judge thereof certified that such bailiff or bailiffs are actually necessary."

"6717. Compensation to such constables.—Bailiffs actually serving in court shall receive three dollars a day for every day they serve, to be paid out of the county treasury on the certificate of the presiding judge showing the number of days the bailiff actually attended the court, and that his service was necessary. In circuits composed of one county having two or more circuit judges, each bailiff shall receive a salary of one thousand dollars per annum, payable in twelve equal monthly installments out of the treasury of the county constituting such circuit upon the warrant of the president of the board of revenue; but nothing in this section or the preceding section shall apply to circuits having five or more judges."

It should be observed here that under these sections as they appeared in the 1923 Code, a different rate of compensation was provided for bailiffs in circuits composed of one county and having two or more circuit judges. In such circuits the bailiff was paid a salary of \$1,000.00 per annum. The basis of employment remained the same for all the circuit courts of the State.

In 1927 (General Acts, 1927, p. 440) Section 6717 of the 1923 Code was amended, and, under this amendment each of the two circuit judges of Montgomery County could appoint a bailiff, whose salary was fixed at \$1800.00 per annum. In Mobile County each of the three circuit judges could appoint a bailiff at a salary of \$1800.00 per annum, and, in addition thereto, the sheriff of said County, when ordered by any of the circuit judges, could appoint two additional bailiffs at a salary of \$1800.00.

In 1931 (General Acts, 1931, p. 66), Section 6717 of the 1923 Code, as amended in 1927, was again amended. Under this amendment no change was made so far as Montgomery County was concerned, but a substantial change was made in reference to Mobile County. Here, each of the three circuit judges could appoint a bailiff at a salary of \$2400.00, to serve at their will and pleasure. In addition, the sheriff could appoint two additional bailiffs to serve at his will and pleasure, at a salary of \$2400.00. It should be noticed that, under this amendment, the sheriff of Mobile County was not required to get an order from a circuit judge before making his appointments, as he was under the 1927 amendment.

In March, 1939, (General Acts, 1939, p. 113), Section 6717 of the 1923 Code, as amended in 1931, was again amended. Under this last amendment the salary of the bailiffs for Montgomery County was changed from \$1800.00 to \$2100.00 per annum. Also, it was provided that the bailiffs appointed by the judges under this amended section **were to be in lieu of bailiffs for the courts as provided for by Section 6716 of the 1923 Code.** Here, again it should be noticed that Section 6716 of the 1923 Code had never been amended and still read as it appeared in the 1923 Code.

In August, 1939, (General Acts, 1939, p. 424), Section 6717 of the 1923 Code as last amended in March, 1939, was again amended. No change was made affecting Montgomery County, but in Mobile County a different situation appears. Each of the three circuit judges could still appoint a bailiff at a salary of \$2400.00, to serve at their pleasure, but no provision was made for the appointment of bailiffs by the sheriff. It was provided, however, that the bailiffs appointed by the judges were to act as deputies sheriff when not engaged as bailiffs, and were to be under the direction and control of the sheriff when acting as his deputies.

Section 6716 of the 1923 Code, *supra*, without any amendments, now appears in the 1940 Code as Section 186 of Title 13. Also Section 6717 of the 1923 Code, as it has been amended from time to time, now appears in the 1940 Code as Section 187 of Title 13. It should also be observed that in the 1940 Code, Section 187 provides that the bailiffs appointed by the judges under this section shall be in lieu of bailiffs for the court under Section 186.

In the case of *State ex rel Farmer v. Haas*, 29 Ala. App. 169, 239 Ala. 16, 194 So. 395, 398, it appears that Farmer was appointed as a bailiff for the Circuit Court of Mobile County by the sheriff under an order of the judges of the court and that such order and appointment was made by virtue of Section 6716 of the 1923 Code (Section 186, Title 13, 1940 Code); that the last order and appointment of Farmer was made on February 20, 1931, and had not been revoked at the time this litigation was instituted; that on October 2, 1939, the said Farmer presented an order to the President of the Board of Revenue and Road Commissioners of Mobile County for a warrant for \$200.00, which was in payment of his services for the month of September, 1939. The Board of Revenue declined payment on the ground that the last 1939 Act (General Acts, 1939, p. 424) had abolished Farmer's employment as bailiff, and it was then that Farmer brought a mandamus suit against the County to compel them to issue him a warrant for the salary claimed by him. A demurrer was sustained by the trial court to the petition for mandamus and the petitioner took a non-suit and appealed. When the appeal was before the Supreme Court it was held that the 1939 Act was not offensive to Section 45 of the Constitution and that it was the intention of the Legislature to vest the appointment of bailiffs in the judges, rather than in the sheriff. The court also held that Section 6716 of the 1923 Code (Section 186, Title 13, Code of 1940) was still in force in counties not covered by the amendatory Act of August, 1939.

In the case of the *State ex rel Farmer v. Haas*, 240 Ala. 30, 196 So. 873, the parties are the same as in the above case and the litigation is similar. In this case Farmer claimed a salary of \$83.33 for the month of September, 1939, under the same appointment as outlined in the first case, on the basis

of \$1,000.00 per annum, the amount prescribed by Section 6717 of the 1923 Code for bailiffs appointed by the sheriffs in circuits composed of one county and having two or more judges. The Board of Revenue declined to issue a warrant for this claim and the petitioner thereupon filed a mandamus against them in the circuit court. The trial court sustained a demurrer to the petition and the petitioner took a non-suit and appealed. When the appeal was before the Supreme Court it was held that the August, 1939 Act was not offensive to Section 106 of the Constitution and that the petitioner was not entitled to a salary on the basis of \$1,000.00 per annum as outlined in Section 6717 of the 1923 Code. The court did not pass upon the question of whether he would have been entitled to the per diem mentioned in said section. That is the main question to be answered in this opinion.

Briefly, in my opinion, the court has held in these decisions that Sections 186 & 187 of Title 13, Code of 1940, are constitutional and valid; that the appointment of bailiffs for the Circuit Court of Mobile County is vested in the judges and not the sheriff; and that Section 186 is in full force in all counties not covered by Section 187.

My answer to your first question is in the negative. Until 1927 the manner of appointing bailiffs for the circuit courts was the same in all the circuits of the State. Up to that time they had been appointed by the sheriffs when ordered to do so by the judges. In 1927 the Legislature granted the judges in Montgomery and Mobile Counties the authority to appoint bailiffs, although the Sheriff of Mobile County was still permitted to appoint two when ordered by any of the circuit judges. This remained true even after the 1931 amendment, except the Sheriff of Mobile County was allowed to appoint two to serve at his pleasure and without an order of a judge. In the Act of March, 1939, it was provided that the bailiffs appointed under Amended Section 6717 of the 1923 Code were to be in lieu of bailiffs provided for under Section 6717. Thus the Legislature considered the authority for appointing bailiffs for Mobile County Circuit Court to be found in Section 6717 of the 1923 Code and not in Section 6716. This idea prevails in Sections 186 and 187 of Title 13, Code of 1940, since Section 187 provides that the bailiffs appointed by the judges under this Section are to be in lieu of bailiffs provided for in Section 186. The effect of the Act of 1939, approved August 25, 1939, *supra*, was to abolish all previous appointments of bailiffs by the Sheriff in Mobile County and also deprive the Sheriff of authority to make any further appointments.

From what has been said it is obvious that your second question does not require an answer.

I am likewise of the opinion that your question numbered three should be answered in the negative. I think it is clear that both Sections 186 and 187 of the Code of 1940 have a field of operations, but that Mobile County cannot take advantage of both. Section 187 provides the manner of appointing and the number of bailiffs for the Circuit Courts of Montgomery and Mobile Counties, while Section 186 provides for the manner of appointment and the number of bailiffs in other circuit courts of the State. When the way and manner of appointing bailiffs for the Courts of Montgomery and Mobile was changed from that prevailing in the other circuits of the State,

the way and manner provided for them was made exclusive, and it was not intended that they might have the advantage of the special way and manner provided and also the general way and manner applicable to the other courts of the State.

It is apparent from what has just been said that there is no necessity for answering your fourth question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 11, 1942.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

JUDGMENTS—

CONCLUSIVENESS—

1. A judgment rendered on the merits, without fraud, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue in all other actions between the parties.

2. Parties acting on such judgment will be protected, although such decision is thereafter overruled.

3. Where the sole question decided controls a public officer in the payment of public funds to one of a class of public servants having mutuality of rights and interests in the question adjudicated with others in his class, such judgment is conclusive on other members of the class, although they were not named as parties in the first suit.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of January 30, 1942, is as follows:

“As Tax Collector of Mobile County, Alabama, I am taking the liberty to lay before you officially, the facts in connection with a situation which

has developed here in Mobile County, in order to ask from you, an opinion upon which to base my actions concerning the matters involved.

"The Civil Service Board for Mobile County, Alabama, administering the Merit System Act, approved September 15th, 1939, has seen fit to reclassify the employees of the Tax Assessor of Mobile County, Alabama, and grant them a raise in compensation. These acts on the part of the Personnel Board appear to have been taken in full conformity to the method of procedure established in the act. The raises granted these employees were to take effect as of October 1, 1940.

"Since October 1, 1940, Harry M. Touart, Tax Assessor of Mobile County, Alabama, has been regularly submitting to me, payrolls covering the employees in his office, all of said payrolls bearing the certificate of the Director of the Civil Service Act, that they were true and correct, that the employees had been discharging their services for the Tax Assessor and were entitled to the compensation as allowed and established by the Civil Service Commission. For convenience, these payrolls have indicated the original salaries which these employees received before being granted said raises and then separately, the amount due them on account of said raises in salary.

"This office, feeling it the best course to pursue, for my own protection, has paid to these employees, in the manner provided by law, that is, by delivering a voucher to the Tax Assessor monthly, for an amount sufficient to cover their original salaries, but I have withheld payment of the raises allowed in behalf of these employees by the Civil Service Commission. Every month, since the presentation of these payrolls, that is, from October 1940 to date, I have withheld from the moneys turned over by me to the Treasurer of Mobile County, Alabama, the aggregate amount of the raises in salary allowed all the employees in the Tax Assessor's office and I have segregated that amount in a special deposit in the bank, which said special deposit is now accumulating, monthly.

"This situation developed to the point where Mr. Otto McCarron, one of the employees of the Tax Assessor, filed in the Circuit Court of this County, a mandamus proceeding against me, praying for an order directing me, as Tax Collector to pay to the Tax Assessor of this County, the raise in salary allowed him by the Civil Service Commission. I employed Mr. Robert E. Gordon, of this city, to appear and contest this proceeding on my behalf. Demurrers were filed which were overruled and the case has now proceeded to a final decree rendered by Judge Claude A. Grayson, presiding Judge of the Circuit Court of Mobile County, Alabama, on January 21, 1942, in favor of the petitioner, Otto McCarron, and directing me to pay said increase in salary which I have with-held as explained above.

"A true copy of this final decree is herewith submitted for your consideration.

"None of the other employees have filed proceedings yet, but each one is entitled to do so, and if they should adopt such course, it would result in a multiplicity of suits and cause me to expend considerable sums as

costs and attorney's fee. Each suit would likely follow the identical course taken in the McCarron suit. If I should appeal the decision of Judge Grayson, it would not only involve personal expense to me, but would result in a substantial delay on the part of these employees in getting their additional compensation, assuming that the decision of Judge Grayson would be substantiated, and in the meantime, the other employees, growing more and more restless, might file additional suits in connection with their claims. The facts and the law in connection with every claim in behalf of an employee of the Tax Assessor, being identical, and it being my personal wish that these employees might receive the additional compensation allowed to them, if by law, I am safe in paying it to them, it is my hope that this one suit is sufficient to establish their rights, without further litigation.

"I am advised that you have heretofore rendered an opinion concerning the constitutionality of this Civil Service Act, and that the same supercedes the provisions of the Taylor Act, approved August 15th, 1935, House Bill No. 473, which determines the method of payment of the employees of the Tax Assessor of Mobile County, Alabama, in so far as said act limits the aggregate amount payable to the employees of said Tax Assessor. The other provisions of said act, of course remain in full force and effect.

"In other words, the sole question at issue, is did the Civil Service Commission have the right to raise the aggregate salaries in the Tax Assessor's office, so that the total would exceed the limit fixed in the Taylor Act, and am I safe in paying said increases in salary without appealing this decision to a higher court.

"I understand it merely to be the law, that I can rely upon your opinion as a guide and protection and I will very greatly appreciate having you advise me in the premises just as soon as you can."

Your request presents two propositions. First, Did the Civil Service Commission have the right to raise the aggregate salaries of the employees in the tax assessor's office so that the limit would exceed the limit fixed in the Taylor Act? Second, Will you be protected in paying such increases in salaries of all such employees if you do not appeal from the judgment rendered in the case of *State of Alabama ex rel. Otto McCarron v. Robert Eugene King, as Tax Collector of Mobile County*?

On the first proposition, it appears that the judgment of the circuit court has, by the judgment rendered in the case, decided that the act of the legislature (No. 410, approved September 15, 1939, General Acts, 1939, p. 542) was constitutional and that the raise in salaries had been legally made. This office is without authority to supervise this judgment and any opinion that this office might render would have no effect on the judgment nor would such opinion furnish any protection to you. The law is well settled in this country that a judgment rendered on the merits, without fraud, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue in all other actions between the parties where this is the sole question presented. This rule applies to courts not of record as well as courts of record. 30 *Amer. Juris. pp. 908 and 909*; *City of Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676, cert. den. 194 Ala. 568, 69 So. 629.

Parties acting on such judgment will be protected although such decision is thereafter overruled. **Cooper v. Hawkins**, 234 Ala. 636, 638, 176 So. 329.

The Circuit Court of Mobile County had jurisdiction in this case, both of the parties and the subject-matter of the suit. Under the foregoing rules, no duty rests on you to take an appeal from the judgment of the court below. The judgment rendered in that court furnishes you ample protection.

The second proposition, will you be protected if you pay the raises in salaries of all the other employees in the tax assessor's office whose claims rest solely on the same question involved in the case where judgment has been rendered? The rules above stated as to conclusiveness of a judgment apply to the parties and their privies in interest in the particular suit. However, these rules in a sense have been extended and made to apply to persons not named in the first suit where the suit involves and controls a public officer in the payment of public monies and his acts therein rest on the proper construction of the law, then a judgment settling the construction if such law is conclusive upon the officer and a class of citizens having mutuality of interest in the question settled with that of the party to such suit. **Town of Tallassee et al. v. State ex rel Brunson et al.**, 206 Ala. 169, 89 So. 514; **City Council of Montgomery v. Walker**, 154 Ala. 242, 45 So. 586; **Freeman on Judgments**, 5th Ed., 956, Section 437; 34 C. J. 1028; 20 A. L. R. 1133.

In my opinion, your case falls within the influence of the principles announced in these cited authorities. In a suit brought against you by any one or all of these employees would be controlled by the judgment that has been rendered. If this be not true, then each employee could institute a similar proceeding and relitigate the same question settled by the first suit. It must follow that you will be protected in paying the other employees in the tax assessor's office who belong to the same class as that of the relator in the judgment rendered in the court below now under consideration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1942.

Hon. E. T. Knight, Chairman
Board of Revenue, Cullman County
Cullman, Alabama.

Costs and Fees — Abatement of Nuisances — State — Fine and Forfeiture Fund —

1. Where liquor nuisances are abated under the provisions of Article 5, Chapter 2, Title 29, Code of 1940, unless the court makes an order assessing the costs against the State of Alabama, such costs are not payable out of the Fine and Forfeiture Fund of the County.

2. Where liquor nuisances are abated under the provisions of Article 5, Chapter 2, Title 29, Code of 1940, and the court assesses the costs against the defendant and upon execution being returned "No property found", and no further order of the court appears, such costs are payable by the State of Alabama out of the Governor's Contingent Fund or the Governor's Emergency Fund, on approval of the Governor.

3. Opinion appearing in Quarterly Reports, Attorney General, Vol. XIX, page 129, clarified.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated October 7, 1941, follows:

"I would appreciate being advised upon the following questions, to-wit:

"1st. The Honorable C. H. Keller, Register of the Circuit Court of Cullman County, Alabama, in Equity, has presented to this body a claim for payment for cost wherein the State of Alabama upon the relation of the Solicitor filed a bill in equity to abate a nuisance, and judgment was rendered against the defendants, taxing them with the cost and execution was issued thereon and returned 'no property found.' I am advised that Mr. Keller addressed a letter to your office requesting a ruling as to how this cost could be collected and was advised that the same was a charge against the fine and forfeiture fund of Cullman County, Alabama. We do not have a fine and forfeiture fund in Cullman County and all of the costs of the criminal court are paid direct from the General Fund under a special statute. The Board of Revenue has declined payment of this claim unless your office rules that it is a proper charge against the general funds of the County.

"2nd. Where the fine and forfeiture fund of a County has been abolished and the cost of the criminal court or the cost created by the State are payable from the General funds, please advise if the claim hereto attached is a proper charge against the County and should be paid from such fund.

"3rd. I wish to call your attention to the fact that the itemized bill of cost discloses 126 witnesses were subpoenaed, 21 certificates were issued, 4 certified copies of the decree were made and are charged as a part of the criminal cost. The bill further shows that seven (7) defendants were summonsed when the cost bill shows on its face that there were only two defendants, that 88 subpoenas for witnesses were executed and the itemized statement on the back of the bill discloses that only 16 state witnesses claimed their attendance. The County certainly does not wish to bear a burden which is not a proper charge against the County and the Board takes the position that in this cost bill there has been charges made which were created by the defendant and, therefore, are not proper charges against the County or State.

"4th. Herewith attached you will find the original claim filed by the Hon. C. H. Keller, together with a purported itemized cost bill which is made a part of said claim. I would appreciate your examining the claim together with the itemized cost bill and advising this Board as to its liability for any of the cost, what are legal charges and what should be paid by said board.

"5th. The Board would further appreciate your advice, so that it may be governed in the future as to what are legal charges against the County on liquor injunction cases where judgment is rendered abating the nuisance and charging the cost to the defendant and where execution is issued thereon and returned 'no property found.' "

This office, in an opinion rendered to Hon. G. H. Boyd, Register, Circuit Court, Jefferson County, under date of May 11, 1940, Quarterly Report, Vol. XIX, page 129, had occasion to consider a question similar to the one presented in the above request.

This opinion held that in the abatement of public nuisance cases (which include liquor nuisance cases), where the costs were by the court assessed against the defendant and upon return of execution "No property found," such costs were payable by the State of Alabama out of the Governor's Contingent Fund or the Governor's Emergency Fund, upon the approval of the Governor.

Upon further consideration of the Boyd opinion, I deem it advisable to clarify my holding in that opinion. In the Boyd opinion, the provisions of Section 152, Title 29, Code of 1940 (Section 4682, Code of 1923) dealing specifically with liquor nuisance cases, were not taken into consideration. Section 152, *supra*, provides as follows:

"§152. Fees and allowances to officers making seizures, when and how paid.— There shall be allowed the officer making the seizure under such writ in an injunction case the sum of three dollars and the sum of ten cents for every mile traveled in making the seizure, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquor and beverages and other movable property seized; all which costs shall be taxed in the bill of costs, and if not collected from a defendant, then shall be taxed and paid as in criminal prosecutions in which the state fails; and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect."

It will be noted from the above quoted code section that where the costs are not collected from the defendant, after the same have been assessed against him, upon proper order of the court, such costs may be collected in the same manner as in criminal cases in which the state fails. This means out of the Fine and Forfeiture Fund of the County or its equivalent. Cf. Biennial Report of Attorney General, 1936-38, page 6.

It appeared in the Boyd opinion, as it appears in the question propounded by you, that the costs in the cases considered were taxed against the defend-

ant, and upon return of execution, "No property found," no further order was made by the court taxing these costs against the State of Alabama. The provisions of Section 152, *supra*, are not self-executing, and before the costs in liquor nuisance cases are chargeable against the Fine and Forfeiture Fund of the county or its equivalent, there must be an order of the court as directed in this section. However, a taxation of costs against the State is sufficient to make the same payable from the Fine and Forfeiture Fund of the county or its equivalent. Cf. Quarterly Report of Attorney General, Vol. XIV, page 314; Biennial Report of Attorney General, *supra*.

Therefore, since it appears that there was no order entered by the trial judge assessing the costs against the State of Alabama in this case, as provided by Section 152, *supra*, it is my opinion that the costs in the same are not a charge against the General Fund or any other fund of your county, the Fine and Forfeiture Fund having been abolished.

With the above clarification of the Boyd opinion, I now adhere to the ruling therein set out. That is to say, that in liquor nuisance cases where the State of Alabama is successful, and the costs are assessed against the defendant, but are not collected from him, and the court does not assess that part of the costs created at the instance of the State against the State, then this part of the costs becomes a charge against the State, and is payable out of the Governor's Contingent Fund or the Governor's Emergency Fund, upon the approval of the Governor.

It will be noted from a reading of the Boyd opinion that in three of the cases, there considered, the State was unsuccessful, and the costs were taxed against the State of Alabama, and I held that such costs were payable by the State in the manner hereinabove noted. After further consideration, I am of the opinion that this part of the Boyd opinion was laid in error, insofar as liquor nuisance cases are concerned, as the costs in these cases should have been payable out of the Fine and Forfeiture Fund of the county or its equivalent.

I hereby clarify that part of the Boyd opinion to conform herewith.

Since it is my opinion that the costs in the case mentioned in your request are not a charge against the General Fund or any other fund of your county, it is not necessary for me to answer the other questions contained in your inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 13, 1942.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
Montgomery, Alabama.

Probate Judge — Marriage License — Fee for Issuing — Fee for Celebrating Rites of Matrimony — Fee for Reporting Same to State Board of Health —

1. Fee of \$1.50 to be charged by Probate Judge for issuing and recording marriage licenses.
2. Probate Judge entitled to fee of \$1.50 for celebrating the rites of matrimony.
3. Probate Judge entitled to fee of .25c for each marriage license issued and reported to State Board of Health.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of February 7, 1942, is as follows:

"Confusion still exists as to the correct amounts allowable to the various probate judges in connection with the issuing and handling of marriage licenses. In order to clarify the situation, will you please advise me in answer to the following:

1. What is the correct amount that should be charged by the probate judge for issuing and recording marriage licenses?

"2. What is the correct amount that should be charged by the Probate judge for celebrating the rites of matrimony?

"3. Is the judge of probate entitled to .25c for every marriage reported to the State Board of Health?

"The 1940 Code sets out the same fees in connection with the above as were contained in the 1923 Code. There is, however, apparently, a conflict between Title 34, Section 18 of the 1940 Code and the schedule under Title 11, Section 29. I am familiar with the rulings of your office, Biennial Report, 1934-36, page 380 and Volume 23, Quarterly Report, page 187."

It is my opinion that the correct amount to be charged by the Probate Judge for issuing and recording a marriage license is \$1.50.

Code of 1940, Title 11, Section 29 provides, among other things, as follows:

"1. Issuing and recording marriage license, together with consent to the marriage, and certificate of its celebration and taking and recording bond \$1.50."

This holding is in accord with an opinion of this office to Hon. J. Lee Smith, Judge of Probate, Chilton County, Clanton, Alabama, dated November 18, 1935 (Biennial Report of Attorney General, 1934-36, page 380).

Answering your second inquiry, it is my opinion that the correct amount that should be charged by the Probate Judge for celebrating the rites of matrimony is \$1.50. This question was recently passed upon by this office in an opinion to Hon. J. F. Laseter, Judge of Probate, Barbour County, Clayton, Alabama, dated May 30, 1941 (Quarterly Report of Attorney General, Vol. 23, Page 187).

It is my opinion that your third inquiry should be answered in the affirmative. Code of 1940, Title 22, Section 92, is as follows:

"§92. Record of marriages furnished board by probate judge.—Within the first five days of each calendar month, the judge of probate in each county shall forward to the bureau of vital statistics of the state board of health, at Montgomery, Alabama, on blank forms to be supplied by said board, reports of all marriage licenses issued in the preceding month, together with all original marriage licenses and marriage certificates returned in the preceding month. For this service the judge of probate shall be entitled to a fee of twenty-five cents for each marriage licenses issued and reported, which fee, to be paid by the person obtaining the license, shall cover also costs of forwarding each original marriage license and marriage certificate returned during the preceding month. Provided further, that if no marriage licenses are issued by and no marriage certificates returned to the judge of probate, the judge of probate shall report such fact to the bureau of vital statistics upon forms prepared and furnished by the state board of health. The records of marriages obtained under the provisions of this section shall be kept and preserved by the state board of health as other vital statistics, under the provisions of section 37 of this title. The bureau of vital statistics of the state board of health is authorized to issue certified copies of any marriage licenses and marriage certificates on file, upon request, to any applicant entitled to the same, upon payment of a fee of fifty cents for each certified copy, unless otherwise exempt. The state registrar shall keep a true and accurate account of all fees received under these provisions and turn said fees over to the treasurer. All marriage license forms used shall be prepared and furnished by the bureau of vital statistics of the state board of health."

It will be noted that the above section specifically provides that the Probate Judge is entitled to a fee of twenty-five cents for each marriage license

reported to the State Board of Health. See opinion of this office to Hon. J. Lee Smith, Judge of Probate, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 16, 1942.

Hon. H. W. Phillips, Clerk,
Circuit Court, Dale County,
Ozark, Alabama.

Costs in Criminal Cases for making transcript to the Supreme Court or Court of Appeals —

1. Where a defendant is convicted of a criminal offense and appeals to the Court of Appeals and then certioraries to the Supreme Court, the clerk will have to wait until final determination of the case in the Supreme Court before the proper taxing of the costs can be ascertained.

2. In misdemeanor cases the cost of making transcript to the Supreme Court or Court of Appeals is payable out of the Fine and Forfeiture Fund. In felony cases said cost is payable by the Department of Corrections and Institutions subject to limitations set out in opinion.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 7, 1942, in which you request an official opinion, is as follows:

"I would appreciate some information on the following question:

"(1.) When a party is convicted in criminal court and takes an appeal to the Court of Appeals, and the Court of Appeals reverses and remands the lower courts decision, and as I understand, it is sent to the Supreme Court for its ruling, and a transcript has been written by the Circuit Clerk.

"(2.) When does the Circuit Clerk get pay for writing the transcript?

"(3.) Where does the Clerk get pay for said transcript?

"(4.) And by what method?

"(5.) When the Circuit Court convicts a party and he takes an appeal to the Court of Appeals, and the Court of Appeals upholds the lower courts decision, how would a Circuit Clerk get his money for the transcript, when and where?

In answer to your first question, I presume where you say "it is sent to the Supreme Court for its ruling" you refer to it being certiorated to the Supreme Court. In this event, you would have to await the decision of the Supreme Court before you could properly determine the taxation of the costs, and, of course, this would include the cost of making the transcript.

In answer to your second, third, fourth and fifth inquiries, I call your attention to an opinion of this office rendered on May 28, 1936, to Hon. B. H. Baker, Clerk of the Circuit Court, Barbour County, Quarterly Report of Attorney General, Volume III, page 145. This opinion, for reasons set out in same, holds the cost of the appeal of a criminal case to the Court of Appeals where the charge is a misdemeanor cannot be paid under Section 3667, Code of Alabama, 1923, now Title 45, Section 69, Code of 1940, but is payable from the Fine and Forfeiture Fund. I am enclosing a copy of this opinion. See also Quarterly Report of the Attorney General Volume XVII, page 210; Quarterly Report of Attorney General Volume XXI, page 88.

Of course, what I have said above refers to cases where the defendant is sentenced to hard labor but the rule is different where the defendant is convicted for a felony and sentenced to the penitentiary. In cases of this character, the defendant is not sentenced for fine and costs but is sentenced to a stated term in the penitentiary as punishment and he does not have to work out the costs. The State pays the costs of the prosecution under Section 3667, Code of Alabama, 1923, now Title 45, Section 69, Code of 1940, but the State will not pay costs in any case for an amount more than \$250. See Title 45, Section 70, Code 1940, which is as follows:

"§70. Costs shall not exceed two hundred and fifty dollars.—The whole costs paid in any one case shall not exceed two hundred and fifty dollars."

Quarterly Report of Attorney General, Volume XVII, page 210, supra.

However, any balance of cost over and above \$250 may be collected out of the fine and forfeiture fund of the county on return of an execution against the defendant "No Property Found." Biennial Report, Attorney General, 1936-38, page 380.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
State of Alabama,
THE CAPITOL.

Gasoline Excise Tax —

The Department of Revenue is required by the injunction of the Federal District Court of Alabama of December 7, 1935, to treat sales of Texas Co. gasoline made by or through stations of retail dealers, in the manner stated in opinion, to the United States as exempt sales, and the Department may accept exemption certificates in lieu of tax.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of May 23, 1941, is as follows:

"Re: Gasoline Excise Tax.

"The Texas Company, a distributor of gasoline in this State, claims to have effected sales of gasoline to the United States under contract with the United States by sales made through dealer service stations in the manner described in the agreed statement of facts in the case of Graves v. The Texas Company (See page 119 of printed transcript of record on appeal of such case to the Supreme Court of the United States), upon which delivery of the gasoline by the dealer stations to the United States an exemption certificate therefor was obtained, and upon the delivery of such exemption certificate to the Texas Company, gasoline in an equal amount was replaced without charge or the payment of tax thereon. The gasoline so delivered by the retail service station operators to the United States was gasoline which had been previously sold by The Texas Company to the retail service station operators, and with respect to which the tax had been paid by The Texas Company to the State, but no tax has been paid upon the gasoline withdrawn from storage by The Texas Company and delivered to the service station operator to replace the gasoline sold by the service station operator to the United States.

"The Texas Company now holds approximately \$40,000 in amount of exemption certificates which it proposes to deliver to the State as evidence that such sales were exempt, and requests the Department to treat the replacement deliveries of gasoline as exempt or non-taxable.

"In the opinion rendered in the above mentioned case on December 7, 1935, (pp. 221, 223 of said printed record) the Court adopted in its findings of facts the facts set forth in said agreed statement of facts above mentioned, and in the decree in said cause rendered December 7, 1935, (pp.

224, 225 of said printed record) the defendants were enjoined from enforcing the gasoline excise tax on gasoline sold to the United States or withdrawn from storage, and which is delivered to the United States by the Texas Company 'or for its account under contracts between it and the United States.'

"You are respectfully requested to advise:

"(a) Whether, under the above mentioned decree, this Department is required to treat such sales of gasoline hereinabove mentioned made by or through stations of retail dealers to the United States as exempt sales made by The Texas Company to the United States; and

"(b) Whether the Department is authorized to accept such exemption certificates, and in connection therewith to construe the subsequent replacement of the gasoline by The Texas Company of the gasoline so sold or delivered as exempt from the excise tax, and the subsequent sale of such replaced gasoline by the retail service station operator as exempt from such excise tax."

It is my opinion that the Department of Revenue is required by the injunction of the District Court of Alabama of December 7, 1935, *infra*, to treat the sales of gasoline described in your letter of inquiry as exempt sales made by the Texas Company to the United States, and is authorized to accept the exemption certificates when supported by proof that the transactions have occurred in the manner described by you.

The Supreme Court of the United States, in *Graves v. Texas Company*, 298 U. S. 393, affirmed a decree of the District Court of three judges permanently enjoining Bibb Graves, then Governor, and certain other officials of the State of Alabama from collecting taxes on sales of gasoline made by the Texas Company to the United States. It has been repeatedly held that in order to determine the effect and scope of a decree granting an injunction, it must be read after looking "to the pleadings and reading the opinion of the court. *Haskell v. Kansas Natural Gas Company*, 224 U. S. 217, 223. Also see cases collated in U. S. C. A., Title 28, Section 723, Appendix page 959, Note 1251.

A reference to the pleadings in the Texas Company case, including the stipulation upon which it was tried, reveals that the District Court had before it for consideration sales of gasoline by the company through (a) company operated service stations, (b) consignment service stations, and (c) independent dealer service stations. This latter category is described in the stipulation which was filed in the United States District Court on October 24, 1935, as follows:

"Independent dealer service stations are stations to which the company makes deliveries of gasoline into the tanks or containers located on the premises of such stations and the title to such gasoline at the time of such delivery passes from the company to the owner or operator of such station and the owner or operator then sells and delivers the gasoline at retail to the public."

Further in the stipulation there is described the procedure followed in selling gasoline, through independent dealers, where employees or representatives of the United States subsequently purchase the gasoline. The procedure described is identical with that detailed in your letter of inquiry. Of particular interest here is the following excerpt from the stipulation relating to these sales:

"All of said deliveries so made by the independent dealers * were made for the account of the (Texas) Company under contracts which the company had with the United States or its departments or agencies, and with the understanding that the company would replace all gasoline so delivered in the manner aforesaid."**

The foregoing quotation is important since it affords a definite clue to the extent of the operations of the decree of injunction issued by the District Court.

Paragraph Two of the decree of injunction against the officers of the State of Alabama involved is as follows:

"(2) The defendants, Albert A. Carmichael, as Attorney General of the State of Alabama, Henry S. Long, as President of the State Tax Commission of Alabama and John P. Kohn, Sr., and W. W. Ramsey as associate members of the State Tax Commission of Alabama, and Bibb Graves as Governor of the State of Alabama and each of them, be and they hereby are restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal to execute or enforce the provisions of the Statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and delivered to the United States by it or for its account under contracts between it and the United States." (Emphasis supplied)

You will note the appearance, both in the decree and in the portion of the stipulation hereinabove quoted, of the words "for its account under contracts between it and the United States," or words of like import. It is my opinion that the district judges, in so framing the decree of the court, contemplated sales made through independent dealers for the account of the company as those sales were explained in the stipulation.

Additional support for this conclusion is found in the opinion of the Supreme Court of the United States in the Texas case, *supra*, wherein we find the following statement:

"Between January 1, 1930, and September 22, 1935, the company sold and delivered to the United States in Alabama 286,639.36 gallons of gasoline."

Reference to the record (R. 116) which was before the court, and upon which the decision of the court was based, reveals that the total of 286,639.36 gallons of gasoline noted in the above quotation was arrived at by including sales of gasoline to independent dealer service stations.

While it may seem, upon a casual reading, that it was not the intention of the Supreme Court, or of the District Court, to include such sales, since it may be argued that where the sale has once been made to an independent dealer tax accrues and the Government, in subsequently purchasing from such dealer pays to tax, but only the price increased by the tax, the record upon which the case was decided seems to indicate otherwise.

I am therefore constrained to advise you that, under the language of the injunction as it now exists, your Department must treat sales of gasoline made as described by you as exempt.

The fact that the injunction is directed to state officials who are no longer in office does not affect the foregoing conclusion, for it would seem that their successors in office, being in privity with them, are likewise bound by the injunction. Cf. 28 Am. Juris. 505 No. 331 n. 5, 6. Nor does the recent decision of the United States Supreme Court in *State of Alabama v. King & Boozer*, Oct. Term, 1941, No. 602, decided November 10, 1941, effect the foregoing conclusion, for in the absence of a modification of the decree of injunction it continues to be effective, despite this later opinion of the Supreme Court, 28 Am. Juris. 494, No. 323, n. 13, 14.

I find no legal objection to the acceptance of the exemption certificates, and the construction of the subsequent replacement of the gasoline so sold or delivered by the Texas Company, as being exempt from the excise tax.

I note, however, that you have also included in your request for opinion the inquiry (b) whether the subsequent sale of such replaced gasoline by the retail service station operator should be treated as exempt from such excise tax. I find no authority for allowing such an exemption if the gasoline is not again sold to agencies of the United States Government. Certainly, the injunction in the Texas Company case would require no such construction. It appears from the stipulation in the Texas Company case that the independent dealer, after such sale to the United States Government or an agency thereof, is delivered without charge an amount of gasoline equivalent to the gasoline previously delivered by the independent dealer to the employee or representative of the United States or department or agency thereof, and the independent dealer is credited by the company with the same margin of profit that he would have had if he had made a sale of such gasoline to third parties not connected with the United States. It is my opinion that the exemption having been allowed the Texas Company by the acceptance by the Department of Revenue of the exemption certificates, no further exemption can be permitted. The Texas Company must account to the Department of Revenue for the tax on the gasoline delivered to the retailer as replacement of gasoline as

detailed in your letter. The retail dealer can sell this gasoline which he has had furnished to him without charge only after including the State tax in the price.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 26, 1942.

Hon. James T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Counties — Telephones — County Agents —

1. Courts of County Commissioners or other like governing body of the county may furnish, at the expense of the county, a telephone for County Agent's office.

2. Courts of County Commissioners or other governing body of the county may pay for, at the expense of the county, long distance telephone calls made by County Agent's office pursuant to official business.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of February 3, 1942, is as follows:

Please advise me if the claim of the Greenville Telephone Exchange for Rent and Long Distance for the County Agent is a just claim against the County.

"The County Agent's office is located in the County building, and the Court would like to know if they can legally pay the telephone rent and long distance for this office."

The Court of County Commissioners, or other like governing body of the county, has the authority to designate which offices in the court house shall be furnished telephones at the expense of the county (Code 1940, Title 12, Section 13.) See opinion to Hon. C. E. Carmichael, Judge of Probate, dated March 20, 1940, Quarterly Report of Attorney General, Vol. 18, page 344, and opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, dated November 9, 1939, Quarterly Report of Attorney General, Vol. 17, page 381.

I note that you state in your inquiry that the County Agent's office is located in the "county building," but I do not know whether you mean by this the "county court house." If this particular office is located in the court house, then, in my opinion, in view of the foregoing, the county commissioners or other like governing body of the county may designate this office as one to be furnished with a telephone at the expense of the county. If, however, the "county building" referred to in your inquiry does not mean the "county court house," then it becomes necessary to look for other authority which would authorize the county governing body to furnish, at the expense of the county, a telephone for this particular office.

In this connection, attention is called to Code 1940, Title 12, Section 12, Subdivision 17, which is as follows:

" * * * 17. Where the state or federal authorities have taken up the works of farm demonstration, or the organization of farm life clubs for the promotion of agriculture, to appropriate for aiding in such work such sum or sums as the county commissioners or board of revenue may deem adequate and necessary."

The above is the only authority which courts of county commissioners or other like governing bodies of the several counties of the State have in regard to agricultural extension work. (Biennial Report of Attorney General, 1934-36, page 741). It is my judgment, however, in view of this authority, that the court of county commissioners, or other like governing body of your county, may furnish, at the expense of the county, a telephone for the County Agent's office. Cf. Opinion to Hon. C. E. Carmichael, *supra*.

I answer that part of your inquiry as to whether or not the court of county commissioners or other like governing body of the county may pay for, at the expense of the county, long distance telephone calls made by the County Agent's office, pursuant to official business, in the affirmative. In this connection, attention is called to an opinion of this office to Hon. T. M. Perry, President, Marengo County Board of Revenue, Linden, Alabama, dated March 25, 1939, Quarterly Report of Attorney General, Vol. 14, page 253, and opinions cited therein.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 26, 1942.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Costs and Fees — Sheriffs — Clerks — Solicitors — Forfeiture
Cases —

1. Fees of clerks and sheriffs in forfeiture cases discussed generally.

2. Solicitor's commission for collecting forfeiture on bail is governed by amount actually collected.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 9, 1942, in which you request an official opinion, is as follows:

"In connection with forfeitures in criminal cases, there is still wide spread uncertainty as to just what schedules of fees sheriffs and clerks should use. In your opinion on page 212, Quarterly Report, Volume 15, you held in line with previous decisions that a forfeiture in a criminal case is a civil action.

"In order to clarify the misunderstanding and differences of opinion that exist in this matter, please advise me in answer to the following:

"1. Should the fees of the Clerk be taxed under Title 11, Section 21, or under Title 11, Section 89?

"2. Should the fees of the sheriff be taxed under Title 11, Section 34 or under Title 11 Section 100?

"3. In an original criminal proceeding a judgment nisi is taken and an alias writ of arrest ordered. Is the Sheriff's fee, for executing said alias writ of arrest a legal and proper charge in the original case or should it be taxed and collected in the forfeiture case?

"4. If under the conditions set out in question No. 3, a defendant is arrested on said alias writ and admitted to bail or committed to jail, should the fee for approving the bond, or guard fee for committing said prisoner be charged in the original case or in the forfeiture case?

"5. Should the fee of .50c (for entering forfeiture vs. defendant) be charged in the original case or in the forfeiture proceedings?

"6. Should a final record be legally and properly made in forfeiture cases?

"7. If your answer to question No. 6 is in the affirmative, what should such final record contain?

"8. Where a judgment nisi has been made final for \$500.00 and the State Board of Pardons and Paroles, by virtue of the power and authority in it vested by the Constitution and Laws of the State orders that the judgment in the amount of \$500.00 be set aside, cancelled and amended upon the specific condition that \$150.00 of the principal amount of the bond forfeited and all costs in the forfeiture case be first paid, should the Solicitor's commission of 5% be based on the amount of \$500.00 or on the amount of \$150.00?"

Rather than answer all of your inquiries categorically, it is deemed advisable to discuss the questions presented in general which will give you the desired information.

Forfeiture cases are civil in their nature and governed by the rules of civil procedure. After the conditional forfeiture is taken, a civil action, separate and apart from the original criminal case, comes into being. Quarterly Report, Attorney General, Vol. XVII page 84; Quarterly Report Attorney General Vol. XV pages 212 and 298.

It, therefore, follows that the fees of the clerks and sheriffs for services performed in such forfeiture cases are the same as fees in civil cases. Code 1940, Title 11, Sections 21 and 34. It must be noted, however, that this rule applies only to those services which are performed in connection with the forfeiture cases proper and not to those that are rendered in the still pending criminal case.

To illustrate the above, I wish to make the following observations: The fees in connection with securing the presence of defendant, as issuing and serving alias writ of arrest, is still part of the original criminal case. Cf. Biennial Report, Attorney General, 1930-32, page 243. Likewise, the fee for approving and additional bond after rearrest and the guard fee is part of the criminal case. The fee of the clerk for entry of forfeiture against defendant of fifty cents (Code 1940, Title 11, Section 89), in my opinion, also should be charged in the criminal case. Trial tax, any fees in connection with issuing and serving citation on the bondsmen and collection of any judgments against said bondsmen are properly chargeable in the forfeiture case. I am of the opinion that the fee of the clerk of fifty cents for "final judgment of forfeiture against defendant" is also part of the forfeiture case despite the fact that said fee is under Section 89, supra.

The above answers your first five inquiries.

In answer to your sixth and seventh inquiries, it is my opinion that a final record may legally and properly be made in forfeiture cases. Such record should contain the docketing of the case and any proceedings which are strict-

ly in connection with the said forfeiture case, as above illustrated. Cf. Biennial Report, Attorney General, 1936-38, page 252.

In answer to your eighth inquiry, the amount of the solicitor's fee is governed by the amount actually collected, that is, on the amount of \$150.00. The solicitor's fee provided for by Code 1940, Title 11, Section 85, is based on 5% of the amount actually collected.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 26, 1942.

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Elections — List of qualified electors — Calhoun County —

Under the provisions of Section 55, Title 17, Code of 1940, the Court of County Commissioners of Calhoun County is authorized to pay assistant clerical help employed by the Probate Judge to complete and properly prepare the list of qualified electors to be furnished the election inspectors, notwithstanding the provisions of Act No. 219, H. 399, approved August 11, 1939, Local Acts, 1939, page 122.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, bearing date of February 19, 1942, is as follows:

"Please give me your official opinion on the following:

"House Bill No. 399 of the Local Acts of the Legislature of 1939 found on page 122, places this office on a salary basis and Section 3 of this act provides for a maximum of \$7,000.00 to be paid by the County for clerical hire for this office.

"Title 17, Section 55, Page 629, of the 1940 Code authorizes the Judge of Probate to employ clerical assistance necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants to be paid by the County board of revenue, a sum not to exceed an amount equal to the number of names on said list multiplied by five cents.

"In your opinion, is the sum authorized to be paid under authority of Title 17, Section 55 of the 1940 Code to be considered as an amount authorized in addition to the amount provided for under House Bill No. 399 of the Acts of 1939 or would such payments be included in the charges against the maximum allowance of \$7,000.00 for regular clerk hire?

"Please give this request your usual prompt attention as the large volume of detail work involved in posting the names of the 450 or more who registered in January and the more than 4,000 that paid poll tax will tax the regular clerks of this office to the utmost and I must employ extra clerks to prepare the list for the election inspectors at my own expense if yours is an adverse opinion in this case."

In reply to the above request, it is my opinion that the sum authorized to be paid under the provisions of Section 55, Title 17, Code of 1940 to assistants and clerical help necessary to complete and properly prepare the list of qualified voters of your county, which list is to be furnished the election inspectors, is in addition to the amount authorized to be paid for clerical help under the provisions of Act No. 219, H. 399, approved August 11, 1939, Local Acts, 1939, page 122.

Section 3 of Act No. 219, *supra*, reads as follows:

"The Board of Revenue, or like governing body, of Calhoun County, Alabama, is required, authorized and empowered to provide sufficient clerks, deputies and assistants to the said Judge of Probate, but the said Judge of Probate shall select the said clerks, deputies and other assistants, and shall fix their compensation, but the combined salaries or compensation of said clerks, deputies and assistants selected by him shall not exceed Seven Thousand & No/100 Dollars (\$7,000.00) per annum. The said Judge of Probate shall have the right to discharge the said clerks, deputies and assistants at will. The Board of Revenue, or like governing body, of Calhoun County, Alabama, is authorized and empowered to adopt rules and regulations, if necessary, for the conducting and operation of such office made necessary by changing the method and basis of compensation under this Act. The salaries or compensation of said clerk, deputies and assistants shall be paid in equal monthly installments out of the general funds of Calhoun County, upon separate warrants drawn in the same manner as other employees of Calhoun are paid."

It is my opinion that the clerks, deputies and assistants referred to in the above quoted excerpt from Act. No. 219 are those clerks, deputies and assistants regularly employed in the probate office to perform and carry out the regular, everyday and ordinary duties in the office of the Probate Judge. This conclusion is strengthened by the fact that it is provided in the above quoted section that the compensation of said clerks, deputies and assistants shall be paid in equal monthly installments, thus showing that the clerks, deputies and assistants therein referred to are full-time employees in the office of the Judge of Probate.

Section 55, Title 17, Code of 1940 is in pertinent part as follows:

"Clerical assistants to make inspectors' list.— The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrants drawn by the commissioners court, board of revenue, or other governing body, on certificate of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents."

It is a matter of common knowledge that the duties to be performed by the assistants and clerks in the above quoted code section is what might be termed an extra-curricular duty imposed upon the office of the Probate Judge. This duty is to be performed only when an election is to be held in the county, and, in my opinion, the duty to be performed by such assistants and clerks could not be properly termed the ordinary and everyday duties of the office of the Probate Judge.

Premises considered, you are advised that both Act No. 219, supra, and Section 55, supra, have a field of operation in Calhoun County. Section 3 of Act No. 219 provides for the compensation of the regular clerical help in the probate office, not to exceed Seven Thousand Dollars (\$7,000.00) per year, while Section 55, supra, provides for special assistants to be employed by the Probate Judge to complete and properly carry out a special duty, i. e., the preparation of a list of qualified electors to be furnished the election inspectors. Therefore, it is my opinion that the sum and amount provided to be paid assistants and clerks to carry out this special duty under Section 55, supra, is in addition to that sum and amount provided for clerical help in Section 3 of Act No. 219, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 2, 1942.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Sheriff's guard fees —

The Sheriff is not entitled to a guard fee where the defendant is simply carried inside the jail to the desk of the jailer for the purpose of making bond and is not committed to jail.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 25, 1942, in which you request an official opinion, is as follows:

"A defendant is arrested on a warrant alleging the commitment of a felony. Such affidavit is made before the Clerk of the Inferior Court of Mobile County, Alabama, and the warrant issued thereon is made returnable to said Court for a preliminary hearing. The warrant is executed by the Sheriff and the Defendant committed to jail, after which he makes bond. On account of a preliminary hearing the Defendant is bound over to await the actions of the Grand Jury, his bond being set at \$..... The Defendant is taken from the Court to the jailer's desk in the guard room situated within the jail, where he and the required number of sureties sign his bond to appear before the Circuit Court to answer any indictment which may be brought against him. Said Defendant is then released.

"Under the above statement of facts, please give me your answer to the following question:

"Does carrying a prisoner to the jailer's desk in the guard room situated within the jail, under the facts set out, *supra*, constitute a legal commitment or confinement of such person as a prisoner so as to entitle the Sheriff to a guard fee?"

Under the situation you detail in your request, my answer to the same is in the negative. I call your attention to Title 11, Section 100, Code of 1940, where it provides as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases — that is to say:

* * * *

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not\$2.00.

"In all arrests under indictment whether convicted or not\$2.00.

"In all other cases where convictions follow arrests\$2.00."

The mere taking of a defendant inside the jail for the purpose of allowing him to make bond is not contemplated within the law, as set out in the above quoted section. You will note it says "committed to jail." Cf. Quarterly Report of Attorney General, Vol. XVIII, pages 84 and 86. This was not intended to cover the defendant being taken into jail or to the jailer's desk and there allowed to make bond. In my opinion the sheriff, under these circumstances, would not be entitled to what is generally known as a guard fee. I

call special attention to an opinion of this office rendered to Hon. Wm. J. Kern, Clerk of the Inferior Criminal Court of Mobile (Quarterly Report of Attorney General, Vol. XVIII, page 222). The pertinent part of this opinion is as follows:

"I do not believe, however that under the facts detailed in your letter of inquiry that a fee for the issuance of a commitment should be charged merely because a person was brought into the outer part of the jail, where a case is docketed against him and he is immediately released on bond returnable to the Inferior Criminal Court of Mobile County. I do not believe that he has been in jail in the sense that a commitment should issue."

If the above is true as to the commitment fee, it is likewise true as to the guard fee in the case you detail above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 2, 1942.

Hon. W. M. Cousins, Jr.,
Clerk and Register,
Circuit and Inferior Courts,
Elmore County,
Wetumpka, Alabama.

Inferior Courts Elmore County — Witness Fees — Act No. 90, H. 387, approved May 29, 1935, (Local Acts, 1935, page 24, Section 5) construed.—

Witness fees in civil cases arising in the Inferior Court of Elmore County still unclaimed 90 days after costs are paid in cases in which said claims arose, held forfeited and payable to county treasurer on the first Monday of next succeeding month following said forfeiture.

Clerks —

Clerk of Inferior Court of Elmore County held entitled to five per cent commission on monies remitted county fine and forfeiture fund.

Costs and fees —

Clerk of Inferior Court of Elmore County held entitled to 10c continuance fee in civil cases and 25c continuance fee in criminal cases.

Trial fees —

Trial fee of \$2.00 assessed in all civil cases amounting to \$101.00 or more and \$5.00 trial fee assessed in all criminal cases docketed in the Inferior Court of Elmore County.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 21, 1941, as follows:

"It has always been the practice of the office to disburse the witness fees collected in Inferior Court to the individual witness. Also to charge a continuance fee of 50c for the County; also to collect a trial tax in each civil case.

"State Examiners are now requiring me to pay all criminal Inferior Court Witness fees over to the County Fine and Forfeiture Fund and civil witness fees over 90 days old into the General Fund.

"To clarify this and other phases of Local Acts No. 90, page 24, Local Acts 1925, will you kindly give me your opinion on the following:

"Under Section 5 of the above Act is it mandatory that criminal witness fees be remitted to the County Fine and Forfeiture Fund and will I be entitled to a commission of 5% on this remittance. Is it mandatory for civil witnesses to be remitted to the county General Fund after being on hand after 90 days?

"Is it lawful for the Clerk to collect 50c continuance fee for the County as was charged in the County Court? What Trial Tax should be collected in civil cases?"

I also have your letter of November 7, 1941, as follows:

"I will appreciate your opinion on the following matter:

"The Inferior Court of Elmore County was created in 1935. I would like to know if all unclaimed witness (Inf.) fees are paid into the office of the Probate Judge after two years, or if they are supposed to be paid every ninety days.

"We have State Examiners in our office at the present and would like to have your opinion as early as possible."

For purposes of convenience I have consolidated your two requests and instead of attempting to answer your questions categorically, I have set out the answers more fully in a general discussion.

I wish to refer you to Section 5 of Act No. 90, H. 387, approved May 29, 1935, (Local Acts, 1935, page 24) creating the Inferior Court of Elmore County, which provides in part as follows:

"It shall also be his duty to collect, or receive from the Sheriff, all fines and forfeitures in said Court, which, together with the Solicitor's fees taxed and collected in said Court, he shall pay into the fine and forfeiture fund of Elmore County, in the same manner as now provided for the disposition of such funds in the Circuit Court of Elmore County, Alabama. The Clerk shall tax in each civil case, except when the amount involved is less than \$101.00, a trial fee of Two Dollars, and shall tax in all criminal cases a trial fee of Five Dollars, to be collected as all other costs are collected, and when collected paid into and become a part of the general fund of the county. Witness fees taxed and collected in civil cases shall be retained by the Clerk and paid over to the witnesses entitled to the same, provided, however, that witnesses shall have five days after their attendance upon the court in any case therein pending, to prove their attendance and to be issued a witness certificate, and failing herein, no costs shall be taxed on account of the said attendance of such witnesses; and provided further, that in case civil witness certificates are not presented to the Clerk for payment within 90 days after the payment of the costs in the cases in which the said certificates were issued, the said witness fee shall revert to the general fund of the county and shall be paid by said Clerk into the County Treasury for the use of the said fund, and the said Clerk shall pay over to the County Treasurer all such reverted fees in his hands on the first Monday of each month. State witness fees in criminal cases shall be taxed, collected, paid into and disbursed from the fine and forfeiture fund of Elmore County, Alabama. That each witness attending Court in civil cases shall be entitled to seventy-five cents (75c) per day and five cents (5c) per mile actually travelled by the most direct route in going to court and returning home, the said witness fees to be taxed as a part of the costs and to be collected and disposed of as herein provided."

You will note that the above quoted law provides that witnesses in cases tried in the Inferior Court of Elmore County, shall have five days after trial date to prove attendance and to be issued a witness certificate. Failure to comply with this mandate of the law, in my judgment, forfeits the right of the witness to claim his attendance fee. In this event, no witness fee shall be taxed or collected in the bill of costs for the attendance of said witnesses.

In civil cases witnesses who have claimed fees as provided above must claim such fees within 90 days after the payment of the costs in the cases in which such witness certificates were issued. Failure by the witness to claim said fees within the time, allowed by law forfeits the witness' right to said fees and by operation of law the said fees become the property of the general fund of the county and must be paid over to the county treasurer. These unclaimed fees must be paid to the county treasurer on the first Monday in each month next following the expiration of the 90 days grace period allowed to the witness to claim his fees.

Concerning witness fees in criminal cases, the mandate of the law as quoted above, seems clear that all these fees must be taxed, collected and paid

into and disbursed from the fine and forfeiture fund of the county. The taking of these fees, of course, is subject to the requirement set out above, that such fees must be claimed within five days after attendance upon trial or no fees may be assessed.

Concerning the question of whether or not you are entitled to 5% commission upon the collection of these fees, I wish to refer you to Subsection 16 of Section 198 of Title 13 of the Code of 1940, which provides as follows:

"To render to the county treasurer, court of county commissioners, or board of revenue, as of December thirty-first and June thirtieth of each year, a statement in writing and under oath, of the fines assessed and forfeitures obtained during the preceding six months, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."

I wish to further refer you to an opinion of the Attorney General, reported in Quarterly Report of the Attorney General, Volume XIV, page 331, which specifically answers your questions.

Concerning whether or not it is mandatory for civil witness fees to be remitted to the county general fund after being on hand 90 days, I wish to advise that my answer is in the affirmative and I wish to refer you to paragraphs 1 through 5 of this opinion as set out above for detailed reasons.

In reply to that part of your request concerning continuance fees in civil and criminal cases, I wish to refer you to an opinion of the Attorney General, addressed to you under date of November 13, 1941, which specifically answers the question herein set out. I enclose a copy of same for your convenience.

You further ask what trial tax must be imposed in cases docketed in the Inferior Court of Elmore County.

In reply, I wish to refer to the pertinent provisions of Section 5 of the above quoted Local Act of 1935 which provides as follows:

"The Clerk shall tax in each civil case, except when the amount involved is less than \$101.00, a trial fee of Two Dollars, and shall tax in all criminal cases a trial fee of Five Dollars, to be collected as all other costs are collected, and when collected paid into and become a part of the general fund of the county."

No elaboration on these provisions seems necessary, and since no other trial fee or tax is provided for this Court none may be collected.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 4, 1942.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton Alabama.

Motor vehicles — License Plates —

License plates for motor vehicles owned by a corporation should be purchased in the county in which said motor vehicle is principally used and operated.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of February 9, 1942, in which you request my official opinion, as follows:

"The Baggett Transportation Company, a corporation, of Birmingham, Alabama, purchased several 1942 license plates for some of their trucks in Chilton County, Alabama.

"The facts, as I understand, are these: This company is a corporation, having its principal place of business in Birmingham, but also has offices at other places, for instance, one in Montgomery, as I am informed and this company is engaged in the business of transporting freight and has a depot or freight terminal in Clanton, Chilton County, and has in charge of this freight terminal an employee, who looks after and attends to the business of this terminal and said trucks load and unload freight at this terminal in this county.

"The said Baggett Transportation Company purchased license plates in this county for several of its trucks, which are operated and used through and in this county. Of course, these trucks are also used and are operated in other counties as well. It has been my contention that under schedule 158.12, Article 13, Chapter 16, page 334 of the Revenue Code of 1935, that said plates were properly purchased in this county.

"Will you, therefore, please advise me under the facts as I have given you, if said license plates were properly purchased in Chilton County?"

I assume that the trucks to which you refer in the above set-out letter are those trucks which operate principally in Chilton County; that is to say, that these trucks make their general headquarters at the terminal located in Clanton.

Based upon the above assumption, it is my opinion that the license plates for these trucks were properly purchased in Chilton County. This matter is governed by the provisions of Section 704, Title 51, Code of 1940, which reads in pertinent part as follows:

"Ad valorem taxation of motor vehicles; assessment and collection; payment prerequisite to issuance of license.— (a) To prevent motor vehicles within the meaning of this article from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate a motor vehicle on the public highways of this state, nor shall any transfer be made by the probate judge as provided under this article, until the ad valorem tax on such vehicle shall have been paid in the county for the preceding year, as evidenced by a receipt of the tax collector where the owner of said vehicle resides, if the vehicle is owned by an individual, and if the vehicle is owned by a firm, corporation or association, then as evidenced by the receipt of the tax collector in the county in which said motor vehicle is used or operated."

It will be noted from the above quoted Code Section that if motor vehicles are owned by a corporation, then the license plates shall be bought in the county in which said motor vehicle is used or operated. The Department of Revenue has long placed an administrative construction that the word "used or operated" means the principal place in which said motor vehicle is used or operated. *Cole et al v. Gullatt*, 4 So. 2, 412.

Based upon this administrative construction, it is my opinion that the license plates for those trucks belonging to the Baggett Transportation Company, which make their general headquarters in Clanton, Alabama, should be purchased in Chilton County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1942.

Hon. Angus Berryhill,
Sheriff, Marion County,
Hamilton, Alabama.

Counties — Statute of Limitations —

Allowance of claims under Title 12, Section 110 of the Code of 1940—

1. Sheriff's claim for attendance allowance in county court is barred by Code of 1940, Title 12, Section 118, unless presented within twelve months.

2. County governing body properly may consider and allow claim of sheriff for attendance provided by Title 11, Section 87 of the Code of 1940, notwithstanding that claim therefor was not presented within twelve months of the rendition of the service upon which the claim is based.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Your letter of December 20, 1941, in which you request an official opinion is as follows:

"I am writing you at this time for your official opinion under Title 11, Section 87, Code of Alabama, 1940. I asked the Judge of Probate about the fee of \$2.00 allowed for each day's attendance by the Sheriff on the County Court when I first went in office, and he said that this was not a proper claim against the county; and I also talked with the Clerk of the Commissioners Court and he said that the county would not pay the claim. But later he said that the county would pay claims for such services for the past twelve months, but that the Statute of Limitations had run on the balance prior to the past twelve months.

"I would appreciate your official opinion on this matter whether the claims are barred by statute of limitations or not after twelve months from the date that they became due.

"Also is this claim not payable under Section 186, pages 116-117, Code of Alabama 1928, Annotated. (Code of 1940, Title 12, Section 110)."

Some confusion heretofore has existed as to the propriety of payment of the sheriff's allowance of \$2.00 per diem for attendance upon the county court from county funds. See Biennial Report, Attorney General, 1930-32, page 440.

However, in an opinion addressed to Hon. A. H. May Sheriff, Houston County, under date of April 16, 1935, this office in effect overruled the above opinion and held that the \$2.00 allowance for attendance upon the county court was properly payable from county funds, upon the presentation to, and allowance by, the county governing body of claim therefor. Opinions of Attorney General, Office Edition, Vol. 3-A, page 188.

On December 14, 1938, Quarterly Report, Attorney General, Vol. XIII, page 119, the opinion in Office Edition Vol. 3-A, supra, was reaffirmed and followed.

In an opinion in Quarterly Report, Attorney General, Vol. XXIII, page 148, which was rendered on May 16, 1941, the holding in the said two former opinions was reaffirmed. In this opinion, however, through inadvertence, the conclusion as to attendance allowance in the county court was based upon Title 13, Section 320 of the Code of 1940; whereas, it should have been based upon Title 11, Section 87, as pointed out in the prior opinions. Cf. *Torbert v. Hale County*, 131 Ala. 143, 30 So. 453.

As I understand your inquiry, the facts are these:

That when you first assumed the office of sheriff you were advised by the clerk of the commissioners' court and by the judge of probate, as principal

judge of the commissioners' court, that this allowance of \$2.00 for each day's attendance upon the county court, provided by Title 11, Section 87 of the Code of 1940, was not payable from county funds; but that, subsequently, you were advised that if a claim therefor was filed by you, the same would be allowed as to all attendance which was not barred by the statute of limitations of twelve months.

I understand that you specifically desire to know (1) if claims for the allowances for such attendance upon the county court can now be made by you and allowed by the county governing body for services rendered more than twelve months prior to the filing of the claim; or (2) if such claims are barred by the statute of limitations of twelve months. Code of 1940, Title 12, Section 118.

Answering your inquiry, it is my opinion that sheriff's claims for the allowance for attendance upon the county court provided by Section 87, Title 11, of the Code of 1940, are such claims as must be presented to, and allowed by, the county governing body; and that, upon failure to present such claims within twelve months of the dates upon which the services were rendered, they are barred by the statute of limitations.—Code 1940, Title 12, Section 118.

I am further of the opinion, however, that, in view of the circumstances stated in your letter, the county governing body may, if it sees fit, consider and allow claims therefor, although barred by the statute of limitations of twelve months, under Title 12, Section 110 of the Code of 1940, which provides:

"§110. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication (sic), or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the Supreme Court or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

In Quarterly Report, Attorney General, Vol. XVI, page 296, this office held that the county governing body might properly consider, allow and order payment of claims for coroner's fees which were barred by reason of the fact that the claims therefor were not presented within twelve months from the dates upon which the services were rendered. Cf. Quarterly Reports, Attorney General, Vol. X, page 133; Vol. XIII, page 79; Vol. XIV, pages 142, 144, 275,

304; Vol. XV, pages 113, 203; Vol. XVIII, page 81; Vol. XIX, page 299; Vol. XXII page 194.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 13, 1942.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Income Tax —

Nonresident individuals who are partners in a partnership having a cost-plus-a-fixed-fee contract with the United States government for construction of defense plant in Alabama held liable for income tax on income derived from such contract, as such income was from "business transacted in Alabama."

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of March 5, 1942, in which you request an official opinion, is as follows:

"An official opinion is requested as to whether or not either a partnership or the individual members thereof are held to be engaged in business in Alabama and subject to the Alabama income tax law under the following statement of facts:

"(1) A non-resident partnership composed of non-resident individuals has a contract on a cost-plus-a-fixed-fee basis with the United States Government to engineer and supervise the construction of a large plant in Alabama in connection with the defense program. While the non-resident partners necessarily spend a negligible portion of their time in Alabama as general supervisors, the actual engineering work is performed by resident engineers, some several hundred in number, the partners directing the policies of the company and the general supervision of the construction in the home office outside the State of Alabama.

"(2) Under the contract with the Federal Government, the company is reimbursed for the actual cost of the engineering work carried on within the State of Alabama on the Federal Reservation, and in addition thereto paid a stipulated fee which would represent the profit from the contract. The partnership and the individual partners composing said partnership

take the position that they are not engaged in business in the State of Alabama, since their services are performed at the home office outside the State; that the profits in excess of the actual cost of the engineering work are earned by them and paid to the partnership by the Federal Government outside the State and, hence not taxable under the Alabama law as profits from business carried on within the State of Alabama.

"(3) It is conceded by the company that the income earned by the resident engineers and paid to them in the State of Alabama for duties performed in this State constitutes taxable income to such individual employees of the company, which question is aside from the issue herein stated.

"Since the office is called upon to decide the question in connection with current returns, which will be due on or before March 16, it will be appreciated if you will let us have an opinion at your earliest convenience as to whether or not the non-resident partnership and the non-resident partners are liable for returns and payment of income tax to the State of Alabama from business transacted or carried on within this State under the facts and circumstances set forth above."

Under the income tax law of Alabama (Code 1940, Title 51, Sections 373-424), individuals carrying on business as a partnership are liable for income tax only in their individual capacity (Section 391). Under subsection 6 of Section 373 of Title 51, Code 1940, which describes the persons taxable under the income tax law, "every non-resident individual receiving taxable income from property owned or business transacted in Alabama" is taxable.

It therefore becomes necessary in answering your inquiry to determine a single question only, i. e.: Is the partnership described in your letter of inquiry transacting business in Alabama?

In resolving this question, we must first determine whether construction of the plant in question in Alabama is "business."

"Business" is defined as that which occupies the time, attention and labor of a man for the purpose of a livelihood or profit. The word is of large and indefinite import and may be said to embrace everything about which a person can be employed. Webster's New International Dictionary, Second Edition, Unabridged; 5 Words and Phrases, Permanent Edition, "Business."

In my opinion, the word "business," as above defined, and as used in subsection 6 of Section 373, *supra*, is sufficiently comprehensive to include the activities in and about the construction of a defense plant such as that referred to in your letter of inquiry. Cf. *Worth Sand and Glass Co. v. S. R. Smythe Co.*, 128 S. W. 1136, 1137 (Tex); *Brown v. German-American Title and Trust Co.*, 34, Atl. 335, 343, 174 Pa. 443.

We therefore pass to a consideration of the further question — Who is transacting this "business" in Alabama?

Subsection 6 of Section 373, *supra*, obviously seeks to reach income growing out of or flowing from a privilege exercised or occupation conducted within the state and each case must be individually examined with this fact in mind. Cf. *State v. Weil*, 232 Ala. 378, 168 So. 679, 685; *Wilcox v. County Commission*, 103 Mass. 44. Examining the present business enterprise in the light of the facts set forth in your letter and the reasonable inferences therefrom, I find that: The business transacted in Alabama is solely the business of the partnership. The construction takes place in Alabama alone. The partners come to Alabama at infrequent intervals as general supervisors, and I think it a justifiable inference that the federal government, under the contract, looks solely to them, as members of the partnership, for the successful completion of the job.

In my opinion, this business enterprise, being the business of the partners, and being carried on in Alabama, under their supervision is business transacted in Alabama by the partners, through the partnership within the meaning of subsection 6 of Section 373 of Title 51, and the partners, as individuals, are liable for the payment of income tax to the State of Alabama on income from such business. Cf. *Ft. Worth Sand and Glass Co. v. S. R. Smythe Co.*, 128 S. W. 1136, 1137 (Tex); *People v. Travis*, 187 N.Y.S. 311, 313; *Trane Co. v. Wis. Tax Com.*, 292 N. W. 897; *U. S. Glue Co. v. Town of Oak Creek*, 153 N. W. 241, 244, 161 Wisc. 21; *H. Lorillard Co. v. Scott*, 212 S. W. 145, 184 Ky. 312; *Hogan & Intertype Corp.*, 206 S. W. 58, 59, 136 Ark. 52; *St. Rev. Com. v. Edgar Bros. Co.*, 190 S. E. 623, 625 (Ga. App.).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 19, 1942.

Hon. Edward L. Colebeck,
Superintendent of Education,
Hale County,
Greensboro, Alabama.

County Board of Education — Warrants — Bonds — National Defense Bonds—

Where County Board of Education has derived moneys from the sale of school bonds, issued for the purpose of erecting a new school building, and due to the war crisis, such school building cannot be erected, such funds may not be used to buy National Defense Bonds or other sound investment securities.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of March 13, 1942, in which you request an official opinion, is as follows:

"This is to state that the Hale County Board of Education has on hand a sum of money approximating \$32,000.00 derived from the proceeds of sale of School Bonds issued to cover part cost of erection of a new high school building at Moundville in this county.

"Due to the War Crisis, Work Projects Administration aid which had already been granted has been withdrawn. Priority for purchase of certain necessary materials needed for construction has been denied by the Office of Production Management. This Board, therefore is unable to proceed with the project of erection of said building.

"The object of this letter is to ask your department whether the above-mentioned idle funds may be legally employed to buy National Defense Bonds, or other sound investment securities, so that this Board may derive some interest on said funds which otherwise must remain idle and unprofitable until such time when the said building plans may be resumed."

My answer to the above question is in the negative.

The bonds referred to in the above request were presumably issued under the provision of Section 216, Title 52, Code of 1940. This section reads in pertinent parts as follows:

"§ 216. Purposes for which warrants issued.—In any county in which a special county tax shall have been voted under the constitution for such purpose or for school purposes generally, and in any school district in which a special district tax shall have been voted under the constitution for such purpose or for school purposes generally, the county board of education, or the city board of education, as the case may be, with the approval of the state superintendent of education, may issue and sell capital outlay warrants for the purposes of erecting, purchasing, altering, enlarging, improving, repairing, and equipping school buildings and school playgrounds, and buildings for housing and repairing school busses, including sites for any such buildings and playgrounds; and for the purpose of purchasing school busses; and for the purpose of acquiring a school building already erected by another government body, which building is being transferred to the use and jurisdiction of the board issuing the warrants; or for any one or more of such purposes; * * * ."

It will be noted from the above quoted excerpt from Section 216 that such warrants may only be issued for the purpose of erecting, purchasing, altering, enlarging, improving, repairing and equipping school buildings and school playgrounds, and buildings for housing and repairing school busses, including sites for any such buildings and playgrounds. It therefore follows that if warrants may only be issued for those purposes enumerated in Section 216, supra, then

the proceeds from the sale of such warrants may only be used for those purposes.

Since it appears from your said request that these warrants were issued for the purpose of raising funds with which to erect a new high school building at Moundville, in your county, and due to the fact that such warrants may only be issued for those purposes set out in Section 216, supra, it is my opinion that the money thus derived may not be used for any other purpose.

Premises considered, I am constrained to hold that the \$32,000 which your County Board of Education now has on hand may not be legally used to buy National Defense Bonds or other sound investment securities.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 19, 1942.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Primary Elections — Absentee Ballots —

1. In primary elections for state and county officers, the law requires one ballot box and one set of election officers to receive and tabulate the result of the vote.

2. There is no authority in law to make any change as to the number of boxes or election officers.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of March 12, 1942, in which you request an official opinion, is as follows:

"The Jefferson County Democratic Executive Committee anticipates that between 2000 and 3000 absentee votes will be cast in this county in the May 5th Primary. On this assumption they have requested that the Election Commission either provide for three absentee boxes with separate sets of officials for each box or appoint an additional number of managers and clerks for the one box. Please advise whether or not the Election Commission is authorized to comply with either one of these requests and, also, if the extra number can be paid for their services as other election officials are paid."

In my opinion, an answer to your question may be found in Code 1940, Title 17, Section 9, and Title 17, Section 418.

Section 9 says in part:

"In addition to the managers and clerks now provided under the laws of this state for elections, there shall be, for all future elections, whether primary, general, special, or municipal appointed at the same time and in the same manner by the appointing board of the county or city, three managers, two clerks, and a returning officer, who shall meet in the office of the judge of probate of the county, (or, except in the case of municipal elections, in a place to be designated by the appointing board) on the day of said election and remain, as officers at other polling places, for the purpose of receiving the ballots of absentee voters from the judge of probate or other person authorized to handle them, as provided herein. The absentee ballots cast as provided by law shall be, by said election officers specified in this section, tabulated separately by precincts, and returns thereof made as now provided by the laws governing the conduct of elections. * * *"

Section 418, dealing with absent voters in primary elections, requires that the chairman of the county executive committee shall deliver the absentee ballots on the day of election to the officers of the election when and where they shall open the envelopes and make a record thereof. This section further provides that the absentee ballots shall be handled in all respects as if the absentee voter was present and voting in person. It is clear from the provisions of these sections that there shall be only one ballot box and one set of election officers as named in said Section 418.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 21, 1942.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Absentee Ballots — Primary Elections — General Elections — Special Elections—Municipal Elections—Time—

1. The first day on which a qualified elector may make application for an absentee ballot for a primary, general, special or municipal election is the twentieth day before the date of the election.

2. The last day on which a qualified elector may make application for an absentee ballot for a primary, general, special or municipal election is the fifth day before the date of the election.

3. The judge of probate, or person authorized by law to act in his stead, shall deliver or forward immediately upon request to a qualified elector making application therefor, an absentee ballot for a primary, general, special or municipal election.

4. Applying these rules to the Democratic Primary to be held on May 5, 1942, Wednesday, April 15, 1942, is the first day on which a qualified elector may make application for an absentee ballot and Thursday, April 30, 1942, is the last day on which he may make such application.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of March 6, 1942, is as follows:

"As some question has arisen in reference to when is the first day a judge of probate can issue an absentee ballot and also what day is the last day, I am asking the following question:

"Should the issuance of absentee ballots for the May 5th Democratic Primary begin on the morning of the 15th day of April and close on the night of April 29th? In other words, ballots cannot be issued before the 15th day of April, or after the 29th day of April."

The presently applicable statutory provision governing the time within which an application for an absentee ballot for a primary election may be made, and the time for the delivery or forwarding of same after such application, is Code of Alabama, 1940, Title 17, Section 420, which reads as follows:

"§420. Probate judges furnishes ballots to absent voters.—The judge of probate of any county in this state, upon application of any qualified elector of his county, **not more than twenty nor less than five days before any primary election is to be held in this state**, shall deliver or forward immediately upon request to such applicant an official ballot and printed form of oath as provided for in the preceding section, for use in such election, with an envelope addressed to the chairman, or in case of vacancy in the chairmanship or disability of the chairman of the county executive committee of the party holding said election, to the secretary thereof; and in the event of a vacancy in the chairmanship and secretaryship or disability of the said chairman and secretary, then the envelope shall be directed to the probate judge of the county in which said absent voter or contemplated absent voter is a qualified elector." (Emphasis supplied)

(It might be well to here point out that Code of Alabama, 1923, Section 680, the forerunner of Section 420, *supra*, provided that applications for such ballots might be made "not more than thirty nor less than five days before any primary election is to be held.")

In order to properly answer your inquiries, it is necessary to bear in mind and apply certain principles of law in regard to time and the computation thereof.

Ordinarily, a day means twenty-four hours, the period of time between any midnight and the midnight following. **McKinnon v. City of Birmingham**, 196 Ala. 56, 71 So. 463.

Generally speaking, the law takes no account of a fraction of a day. **Beck v. Johnson**, 235 Ala. 323, 179 So. 225.

The time within which any act is provided by law to be done must be computed by excluding the first day and including the last. Code of Alabama, 1940, Title 1, Section 12.

Where a period of time during which an act may or must be performed is referred to as being "before" a designated day or date, such word is generally construed as a word of limitation of time, and as excluding, in the computation of the specified period, the day or date designated. 62 C. J. 985 Section 33.

The best statement as to the meaning of the phrase "not less than" in specifying a period of time, which I have been able to find, is the following excerpt from the case of **Mathewson v. Ham**, 21 R. I. 203, 42 Atl. 871, which is cited and quoted in 62 C. J. 985, Section 32, Note 91:

"There is a conflict of authority on this point, and * * * quite a number of cases may be found which lay such stress upon the words 'not less' or 'at least' as to imply from them a day more than could be required in simply the same number of days. We think, however, that the better reason is with the other view. It is an elementary general rule that the law does not regard a part of a day * * *. Another general rule * * * is that, in computing time from a day, such day shall not be included * * *. It seems reasonable, with such a well-known and general rule, that in using the words 'not less than' * * * they were used with reference to the rule and not for the purpose of requiring another day, which could have been done more aptly. Moreover, if part of a day is to be taken as a whole day, the words 'not less' do not add anything, for * * * full days are implied in law without them. The words, therefore, mean, 'not less than' * * * days, as days are counted in law."

When these principles are applied to the instant situation, it appears:

1. In determining the first and last days on which a qualified elector may make application for an absentee ballot for a primary election, the date of the primary election is excluded.

2. The first day on which a qualified elector may make application for an absentee ballot for a primary election is the twentieth day before the date of such election, since the twentieth day is "not more than twenty * * * days" before that date.

3. The last day on which a qualified elector may make application for an absentee ballot for a primary election is the fifth day before the date of such election, since the fifth day is "not * * * less than five days" before that date.

Direct authority for these conclusions is found in the cases of *Cosgriff v. Board of Election Commissioners of the State and County of San Francisco*, 161 Cal. 407, 91 P. 98, and *State ex rel Jones v. Board of Deputy State Supervisors and Inspectors of Elections of Montgomery County*, 93 O. St. 14, 112 N. E. 136, which latter case cites and quotes with approval from the former case. In the *Cosgriff* Case the question for decision was whether or not a certificate of nomination, duly verified, with the requisite number of signatures of electors thereto, was presented for filing within time on October 17, 1906, the date of the election being November 6, 1906, and the statute under which the certificate of nomination was presented providing that the same might be filed "not more than fifty days nor less than twenty days before the day of election." Because of the similarity of the statutory provision there construed, and our statutory provision here under consideration, the reasoning of the court in that case is so pertinent and apt that I quote from the opinion the following:

"The word 'days', as here used, refers to a day as a unit of time, and not as an aggregation of a certain number of hours, minutes or seconds. In this sense, and for the purpose thus used, a day is not capable of subdivision into hours, minutes, or seconds, but is to be taken as a whole. In such computations the hours are not counted to ascertain whether a period of twenty-four hours, or a given number of such periods, have elapsed between the act to be done and the day from which the time is to begin running. The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day is, by this rule, **one day before** every part of the succeeding day. The last moment of any day is, in contemplation of law in such cases, one day before the first moment of the next day, although the elapsed time is infinitesimal. The rule is strictly one of convenience. Any other method of computation would require an accurate account to be kept of the exact hour, minute, and second of the occurrence of the act to be timed, would produce endless confusion and strife, and would prove impolitic, if not wholly impracticable.

"By the method stated, it is clear that the offer of October 17th was in time. Manifestly, on that theory, the fifth day of November would be one day before the sixth day of that month, and not less than one day before, since the number five is one less than six. So, by counting the consecutive days backward from November 6th, it will be found that October 17th was twenty days, and if twenty days, then not less than twenty days, before November 6th. This is what is contemplated by Section 12 of the Political Code, declaring that in computing time by days, the first day is to be excluded and the last day included. Excluding November 6th, the first day, we find October 17th to be the twentieth day, or the last day of the period, and as it is to be included in the count, it must be counted as part of the period. Thus, it makes the full number of twenty days before the day of the election, and it cannot be 'less than twenty days before' that day. This application of the rule is well established. (*Misch v. Mayhew*, 51 Cal. 514; *Hagenmeyer v. Mendocino County*, 82 Cal. 217, (23 Pac. 14); *Derby v.*

Modesto, 104 Cal. 522, (38 Pac. 900); Bates v. Howard, 105 Cal. 182, (38 Pac. 715); Bellmer v. Blessington, 136 Cal. 4, (68 Pac. 111); Hannah v. Green, 143 Cal. 21, (76 Pac. 708.)"

Cf. **Richter v. State**, 156 Ala. 127, 47 So. 163; Opinion of the Attorney General to Hon. Henry N. Hughes, Chairman, Montgomery County Democratic Executive Committee, Montgomery, Alabama, under date of June 22, 1933, Biennial Report 1932-34, page 267.

Applying these rules to the Democratic Primary to be held on May 5, 1942, it results that the first day on which a qualified elector may make application for an absentee ballot for such primary is Wednesday, April 15, 1942, and the last day on which he may make such application is Thursday, April 30, 1942.

Of course, regardless of the time when the application for an absentee ballot is made, provided it is within the statutory period, the judge of probate, or person authorized by law to act in his stead (Code of Alabama, 1940, Title 17, Section 6), shall deliver or forward such ballot **immediately** upon request to the qualified elector making application therefor. Section 420, *supra*.

While you do not make any inquiry as to the first and last days on which a qualified elector may make application for an absentee ballot for general, special or municipal elections, I deem it advisable to state that the holdings of this opinion as to the method of determining the first and last days on which such application for such ballot may be made for a primary election also obtain in determining the same in general, special or municipal elections, since the presently applicable statutory provision governing the time within which an application for an absentee ballot for general, special or municipal elections may be made, and the time for the delivery or forwarding of same after such application (Code 1940, Title 17, Section 60) is identical in legal effect with Section 420, *supra*, so far as this question is concerned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 23, 1942.

Hon. Norvelle Leigh, Jr.
Judge of Probate,
Mobile County,
Mobile, Alabama.

Elections — Poll Lists — Probate Judge — Election Inspectors.

1. Under the provisions of Sections 38 and 40, Title 17, Code of 1940, the Probate Judge is only required to furnish one correct list, by precincts, to the election inspectors at each voting place in the county.

2. It is the duty of the Probate Judge to strike the names of those persons who have been purged by the Board of Registrars from the list of qualified voters immediately upon receipt by the Probate Judge of this information from the Board of Registrars.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of January 30, 1942, is as follows:

"There are two questions on which I would like to have your opinion, one relating to furnishing lists of qualified electors to election inspectors, and the other to purging disqualified electors, under Section 37, Title 62, Code of 1940, which relates solely to Mobile County.

"As to the first question, the pertinent parts of Title 17, Section 38 of the Code of 1940 require the Judge of Probate of each County to publish on or before April 15, 1940, and each two years thereafter, an alphabetical list by precincts of all qualified electors within his county, and if by inadvertence or otherwise, the name of any elector is omitted, the same can be added on proper proof, and an additional publication must be made on or before the first day of May. This section declares that: 'The alphabetical list of voters published by said Judge of Probate on or before the fifteenth day of April, together with the names added and published on or before the first day of May, shall be the official list of qualified voters in said County, and for the districts and precincts therein, for the next ensuing year, until a new list is published'; and further provides that 'The Judge of Probate shall deliver, or cause to be delivered to the inspectors of each voting place in his County, a list of said qualified electors immediately preceding every election or primary.'

"Section 40 of the same Title places the duty on the Judge of Probate to 'make correct alphabetical lists of the qualified electors registered by Precincts, which list shall be certified by him, officially to be a full and correct copy of the list of registered electors for each precinct respectively, as the same appears from the returns of the Board of Registrars on file in his office', and to deliver, or cause to be delivered, one copy of said list to the inspectors of each precinct immediately preceding every election or primary.

"Construing the above mentioned sections together is it or not in your opinion necessary that the Judge of Probate immediately preceding each election, general or primary, deliver or cause to be delivered to the inspectors of each precinct or ward, two lists, one under Section 38, containing an alphabetical list of every qualified elector in the County and another under Section 40, containing only an alphabetical list of qualified electors of the precinct or ward, or will it suffice to furnish to the inspectors of each ward, an alphabetical list containing only the names of the qualified electors in that particular ward or precinct?

"You will observe that Section 38 provides that the 'alphabetical list' of the voters **published** by said Judge of Probate, on or before the 15th day of April, together with the names added and published on or before the first day of May, 'shall be the **official list** of qualified voters in said County and for the districts and precincts therein, for the next ensuing year, until a new list is published.'

"If you reach the conclusion it is the duty of each Judge of Probate to furnish both lists above mentioned, then, in your opinion, will it be sufficient, in so far as the list of qualified electors for the entire County is concerned, to deliver to the inspectors a copy of the printed list published in the newspaper, the section stating that the alphabetical list of voters, **published** by the Judge of Probate, shall be the official list of qualified voters for the ensuing year?

"As to the second question, which, as already stated, relates to purging the list of Voters under Section 37, Title 62, of the Code. Under the general law, all purgings of lists are done before the first publication of alphabetical lists of qualified electors; but under Section 37, Title 62, which applies solely to Mobile County, the registrars meet on the first day of each October, and remain in session, Sundays and holidays excluded, through the succeeding February first, for the purpose of registering voters. Another meeting, beginning on the first Monday in April and continuing for thirty days, is held for the purpose of purging the registration lists, and the registrars meet again on the first Monday after the expiration of one week from the expiration of the last mentioned session, to hear objections to purging. No reports of purging of lists for Mobile County, can be made until after the primary to be held May 5th, 1942, and therefore it necessarily follows that any person whose name appears on the published alphabetical list as a qualified elector, even though he be, in fact as a matter of law, disqualified, will have the right to vote in the 1942 primary.

"In view of the fact that the law requires that when a name has been purged and reported by the Registrars it must be stricken from the certified list, has the Judge of Probate of Mobile County the right to strike from the lists to be used for the general election in November, the names of those purged, and reported by the board of registrars, even though Section 38 of the above mentioned Title provides that the list published shall constitute the list of qualified electors for the ensuing year and until a new list is published?"

In answer to your first inquiry, it is my opinion that it is only the duty of the Probate Judge to furnish the election inspectors at each voting place in the county one list of registered voters.

Section 38 and Section 40, Title 17, Code of 1940 must be read and construed together. Both sections attempt to reach the same end; that is to say, that a correct list by precinct of all registered voters of the county be furnished to the election inspectors in each precinct immediately preceding every election or primary. I do not believe it could be logically contended that the duty is imposed upon the Probate Judge to furnish the election inspectors two

lists, as the end sought to be accomplished is to furnish the election inspectors with a correct list of all those persons entitled to vote in each precinct.

It will be noted from Section 38 that the list required to be published shall be published on or before the fifteenth day of April, 1940, and each two years thereafter, there being no provisions whatsoever for the publication of a list of qualified electors in odd numbered years, though said section requires a list of qualified electors to be made by the Judge of Probate each year. It can thus be seen that the list required to be published in the even numbered years is not, and cannot be, a true and legal guide for elections held in the odd numbered years.

Premises considered, it is my opinion that if you furnish the election inspectors in each precinct with a correct, alphabetical list of the qualified voters of that precinct, as the same appears upon the list in your office, then you will have complied with the law in this regard.

In answer to your second inquiry, it is my opinion that you, as Judge of Probate, have the right to strike from the list of qualified electors to be used in the second primary, namely, on June 2, 1942, and from the list of qualified electors to be used in the general election held in November, the names of those persons purged by the Board of Registrars of Mobile County, Section 37, Title 62, Code of 1940 only changes the time at which the Board of Registrars of your county shall meet for the purpose of purging the registered list of voters of your county. It appears from said section that the Board shall meet for this purpose on the first Monday in April of each year, and remain in session thirty days, Sunday and legal holidays excepted, and shall meet on the first Monday after expiration of one week from the expiration of the last mentioned session for the purpose of hearing objections to striking names from the registration list. This section is silent as to the duties of the Board of Registrars of your county. Therefore, I must turn to the general law to ascertain such duties. Section 49, Title 17, Code of 1940, which is a part of the general Registration Laws of the State, provides as follows:

"§49. Books kept as to names stricken from list.—The board of registrars shall enter in a book to be furnished by the secretary of state, at the expense of the state for that purpose, the names in alphabetical order by precincts of all electors stricken from the registration list, and after each meeting for purging the registration list shall file the same in the office of the judge of probate. On the filing of said book the judge of probate shall strike all such names from the list in his office and shall not again send them out to the inspectors."

After the Board of Registrars of your county has reported to you the names of those persons purged from the registration list, as provided by Section 49, supra, it then becomes your duty to strike all such names from the list of qualified electors, and you shall not again send such names out to the inspectors.

Premises considered, if the Board of Registration of your county reports to you those names which they have stricken from the list of qualified electors prior to the second primary to be held on June 2, 1942, and the general election in November, then it is your duty to strike such person's name from the

list of qualified electors, notwithstanding Section 38 of Title 17 provides that the list published shall constitute the list of qualified electors for the ensuing year and until a new list is published.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 23, 1942.

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

Absentee Ballots — Primary Elections — General Elections — Special Elections — Municipal Elections —

A qualified elector of the State of Alabama, who is absent from the county in which he is a qualified elector during the hours the polls are open on the date of any primary, general, special or municipal election, by reason of his regular business and in the performance of his regular duties, may secure and cast an absentee ballot in such election, even though he may be in the county in which he is a qualified elector on said date, before the opening of the polls and after the closing of the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of March 13, 1942, is as follows:

"I am writing to request your official opinion upon the following question:

"Is a voter entitled to vote an absentee ballot, in Clay County, in the Primary Election to be held May 5, 1942, under the following conditions?

"He resides in Clay County, is a legal voter in the Precinct of his residence, spends each night at his home here, but works on a defense job in Talladega County, going to and from his work each day. He will be forced to be on this job during all of the time the polls are open for voting on May 5, 1942. Is it legal for him to vote an absentee vote here by otherwise complying with the law relative to voting an absentee ballot?

"We have many workers, who are voters here, in exactly the same position indicated above, and will not get to vote, unless it is legal for them to vote an absentee ballot."

The voting of absentee ballots in primary elections in this State is governed generally by the provisions of Code of Alabama, 1940, Title 17, Chapter 2, Article 3, Sections 417-424. (See also Code of Alabama, 1940, Title 17, Chapter 1, Article 1, Sections 5-11.) Section 417 defines an absent voter in a primary election and reads as follows:

"§417. Absent voter in primary election defined.—Any qualified elector of this state whose name at the time of such primary election appears on the official list of qualified voters in said county and who may at any primary election hereafter held pursuant to law in this state, by reason of his regular business and in the performance of his regular duties, be absent from the county in which he is a qualified elector, may vote in such primary election in the manner and under the regulations hereinafter prescribed with like effect as if he were casting his vote in person at his regular and proper polling place."

From a reading of this section, it is to be noted that the factor which gives a qualified elector the right to cast an absentee ballot in a primary election is his absence from the county in which he is a qualified elector at any primary election, by reason of his regular business and in the performance of his regular duties. Said section does not require that he be so absent from the county in which he is a qualified elector on the day or date of the primary election. However, included in the oath or affidavit, which forms a nondetachable part of the ballot, and which the absent voter must swear to and subscribe in order for his ballot to be counted (see Code of Alabama, 1940, Title 17, Section 5 and 422), is the following, taken from the form of oath set out in Section 422:

"That he will be absent from the county of his residence on the **day of the primary** by reason of his regular business and in the performance of his regular duties." (Emphasis supplied)

Code of Alabama, 1940, Title 17, Sections 131 and 172, dealing with general elections held in the State of Alabama, read, respectively, as follows:

"131. Time and place of holding elections.—The inspectors, clerks and returning officers appointed shall meet at the place of holding elections in the several precincts for which they have been appointed, by eight o'clock of the morning of the election, and before nine o'clock open the several polling places as designated."

"§172. Polls; how long open.—The polls must be opened at each place of voting, in each precinct, between the hours of eight and nine o'clock in the morning and kept open without intermission or adjournment until the hour of five in the afternoon, and no longer; provided, that in cities and towns of over five thousand inhabitants the polls shall remain open until six o'clock in the evening, and no longer."

However, by virtue of the provisions of Code of Alabama, 1940, Title 17, Section 339, the provisions of these sections also apply to primary elections. See opinion of the Attorney General to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama under date of May 1, 1940, Quarterly Report, Vol. XIX, page 117, which reached this same conclusion in construing the then applicable forerunners of said sections. Consequently, the polls are opened in a primary election between the hours of eight and nine o'clock in the morning, and are closed at five o'clock in the afternoon, except in cities and towns of over five thousand inhabitants, where they are closed at six o'clock. If a qualified elector is absent from the county in which he is a qualified elector during these hours, on the day or date of a primary election, he cannot vote in said primary election, even though he is in the county on that day or date, before the polls are opened and after they are closed, unless he can secure and cast an absentee ballot therein.

Consequently, it is my opinion that "day of primary" as used in Section 422, *supra*, means the hours during which the polls are open rather than the entire day of twenty-four hours; and that a qualified elector who will be absent from the county in which he is a qualified elector on the day of the primary election during the hours the polls are open, may secure and cast an absentee ballot in said primary election, even though he is in the county in which he is a qualified elector on that date before the polls are opened and after they are closed.

In reaching this conclusion, I am not unmindful of the general rules that a day means twenty-four hours, the period of time between any midnight and the midnight following, and that the law takes no account of a fraction of a day. See opinion of the Attorney General to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of March 21, 1942, and authorities therein cited. However, according to the context, and as used for particular purposes in a statute, the word "day" may designate longer or shorter periods of the natural day than twenty-four hours, extending from midnight to midnight. See 62 C. J. 976-77, Section 26, and cases cited in Note 86. When this rule is applied to the instant situation, it is my opinion that "day of the primary" as used in Section 422, *supra*, designates a shorter period of the natural day than twenty-four hours and means a day beginning with the time the polls are opened and ending with the time the polls are closed.

This conclusion is in accord with the fundamental rule of statutory construction, to which all other particular rules for construing statutes are subservient, which is to ascertain and give effect to the intention of the Legislature as expressed in the statute, which, when ascertained, is the law itself. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159; *Street v. Cloe*, 207 Ala. 631, 93 So. 591; *Abramson v. Hard*, 229 Ala. 2, 155 So. 590.

While your inquiry is confined to primary elections, I deem it advisable to state that the holdings of this opinion are also applicable to general, special or municipal elections, since the presently applicable statutory provisions governing the voting of absentee ballots in general, special or municipal elections in this State (Code of Alabama 1940, Title 17, Chapter 1, Article 4, Sections 57-64) are identical in legal effect with the statutory provi-

sions governing the voting of absentee ballots in primary elections in this state (Code of Alabama, 1940, Title 17, Chapter 2, Article 3, Sections 417-424, supra) so far as this question is concerned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 23, 1942.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Time—Elections.

1. Time as defined in Code of 1940, Title 1, Section 12, is the standard time for the ninetieth degree of longitude west of Greenwich, as established pursuant to an Act of the National Congress, approved March 19, 1918, as amended.

2. Daylight Saving (War) Time governs the opening and closing of the polls in all elections.

3. Case of *Ellard v. Goodall*, 203 Ala. 476, 83 So. 568, distinguished.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your request for official opinion bearing date of March 6, 1942, is as follows:

"Please advise me whether or not the time for the election (May 5th Democratic Primary) is to be held under what is generally known as **Standard Railroad Central Time** as defined in Title 1, Section 12, Code of Alabama, 1940, or is it to be held under what we call Central War Time?"

Official time for the State of Alabama is defined by the Code of Alabama, 1940, Title 1, Section 12, which in pertinent part is as follows:

"§ 12. **Time; how computed.**— * * * In designating the hours of the day, the time used shall be that of the ninetieth degree of longitude west of Greenwich, otherwise known as standard railroad central time."

This definition derives from an act of October 6, 1903, General Acts, 1903, page 395, and was incorporated in the Code of Alabama, 1907, in Section 11 thereof.

The modern method of designating time for the whole earth had its inception in the year 1878, when a plan was adopted fixing twenty-four standard meridians, fifteen degrees apart in longitude, starting from Greenwich. These meridians were designated as centers of twenty-four time zones, and the measurement of time for practical purposes based upon the Greenwich reckoning. The commonly accepted Greenwich reckoning is not absolute, and different methods of computing time exist in daily use now for certain scientific and marine purposes. The two most commonly accepted designations of time are: Greenwich civil time, which denotes time measured from Greenwich mean midnight, and Greenwich mean astronomical time, which denotes time reckoned from mean noon. These designations of time are independent of mean solar time and the different designations of sidereal time.

Shortly after 1878, the railways of the United States, acting in concert, adopted as their official time a time known as the mean astronomical time of designated longitudes west of Greenwich. Thus came into use a phrase "standard railroad time", and the more particular designations "standard railroad eastern time" and "standard railroad central time," etc.

By an act approved March 19, 1918, United States Statutes at Large, Vol. 40, Part 1, page 450, (U. S. C. A. Title 15, Sections 261-264) the Congress of the United States divided the territory of the continental United States into five zones for the purpose of establishing the standard time of the United States. The standard time designated by that act for the second zone (within which zone Alabama lies) was to be based on the mean astronomical time of the ninetieth degree of longitude west of Greenwich.

By Section 3 of that act the standard time of each zone was advanced one hour for a certain duration, and declared retarded and returned to the mean astronomical time of the degree of longitude governing said zone at the expiration of the duration. By the terms of said section "in each year the standard time in each zone shall be one hour in advance of the mean astronomical time of the degree of longitude governing each zone, respectively."

By act of Congress, August 20, 1919, U. S. Statutes at Large, Volume 41, page 280, Section 3 of the act of March 19, 1918, *supra*, was repealed.

By Public Law No. 403 of the 77 Congress, Chapter 7, 2nd Session (S. 2160) the Congress of the United States recently enacted a statute captioned "To promote the national security and defense by establishing daylight saving time," which act reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning at 2 o'clock antemeridian of the twentieth day after the date of enactment of this Act, the standard time of each zone established pursuant to the Act entitled 'An Act to save daylight and to provide standard time for the United States', approved March 19, 1918, as amended, shall be advanced one hour.

"Sec. 2. This Act shall cease to be in effect six months after the termination of the present war or at such earlier date as the Congress shall by concurrent resolution designate, and at 2 o'clock antemeridian of the last Sunday in the calendar month following the calendar month during which this Act ceases to be in effect the standard time of each zone shall be returned to the mean astronomical time of the degree of longitude governing the standard time for such zone as provided in such Act of March 19, 1918, as amended.

"Approved, January 20, 1942."

From a reading of Section 2 of the above act, it is very apparent that standard time of the several designated zones is not the mean astronomical time of such zones but is merely based on the mean astronomical time of the particular zones. The mean astronomical time of certain degrees west of Greenwich was not of itself adopted as standard time. Except for the above referred to Acts of Congress, there is no national designation of standard time, nor in the computation of time in Greenwich is there a standard time designated. Thus, "standard time," as used in the United States, must have reference to that designation as fixed by Congress, since neither the astronomical journal nor the Nautical Almanac designates "standard time."

The term "standard railroad central time" as used in Title 1, Section 12, must have reference to some definite standard to make it capable of meaning. Officially, there exists no such designated time as "standard railroad central time" except as it relates to the time fixed by Congress to govern "movement of all common carriers engaged in commerce between the several states or between a state and any of the territories of the United States," etc.

In my opinion, when the Legislature adopted the Code of 1923, and when it adopted the Code of 1940, the phrase "standard railroad central time," as used therein must, of necessity, have been used with reference to the standard of time as fixed by Congress, since, by act of Congress, a time was designated to govern "the movement of all common carriers engaged in commerce between the several states or between a state and any of the territories of the United States." It is further my opinion that that standard time as fixed in the Code of 1940, Title 1, Section 12, being based upon a standard of time fixed by Congress was by the Act of Congress of January 20, 1942, *supra*, advanced one hour, and that advanced time is, in effect, the standard time of the ninetieth degree of longitude west of Greenwich, and as such controlling for the State of Alabama in the conduct of its official business.

The case of *Ellard v. Goodall*, 203 Ala. 476, 83 So. 568, has been called to my attention, as apparently in conflict with the conclusion reached by me above. However, in my opinion, this case may be distinguished in that, under the facts under consideration there, a judgment was entered on March 19, 1918, which was the same day that an act of Congress was approved advancing the standard time of each zone one hour, the advance to be made effective the last Sunday in March of that year. Ninety days thereafter, and at 11:15 P. M. of the mean astronomical time of the ninetieth degree of longitude west of Greenwich, and at 12:15 A. M. of the standard time of the United States, a bill of exceptions was presented to the presiding judge. The motion to strike

the bill of exceptions proceeded on the theory that the bill of exceptions was not presented within ninety days after judgment entered, as required by the Code of 1907, Section 3019.

Under the above facts, the court held that the Act of Congress of March 19, 1918, *supra*, did not modify the period fixed by the said Code Section 3019, in that the statute contemplated a period of ninety days of twenty-four hours each, and that the appellant in this case properly presented his bill of exceptions within the required time.

Nowhere in this opinion did the court attempt to say or to infer that the standard of time, as fixed by Section 11 of the Code of 1907, was not affected by the Act of Congress of March 19, 1918.

The premises considered, I am of the opinion that time, as defined in Code of 1940, Title 1, Section 12, is the standard time for the ninetieth degree of longitude west of Greenwich, as established pursuant to the act of the National Congress, approved March 19, 1918, as amended, *supra*, known as Day-light Saving (War) Time; and as such is controlling for the State of Alabama in the conduct of its official business. Consequently it governs the time of the opening and closing of the polls in all elections, primary, general, special and municipal.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 24, 1942.

Board of Revenue of Barbour County,
Eufaula,
Alabama.

Statutes—Barbour County—

The adoption of the 1940 Code did not repeal Act No. 391, Local Acts 1927, page 322, and the treasurer of Barbour County should be governed by the provisions of the Local Act.

Opinion by Assistant Attorney General Mooneyham.

Dear Sirs:

Your letter of March 13, 1942, over the signature of your counsel, is as follows:

“We write you as Attorneys for Barbour County and its Board of Revenue.

"Please refer to a local Act of the Legislature of Alabama, approved August 25th, 1927, Acts 1927, pages 322 et seq., relative to the Barbour County Board of Revenue, and especially Section 12. Our Board being a local Board by special enactment makes it very plain. The Code of 1940, Title 12, relative to a County Treasurer, Section 30 et seq., Volumes 8-13, outlines the County Treasurer and his duties. The Bond Company people on our Treasurer's official bond insist that under the law, Section 44 et seq., must be the rule of conduct, and that the local law of 1927 is repealed.

"Our Treasurer desires an opinion from you as to what he shall follow—the local act of 1927—or the law as written under the Code of 1940."

It is my information, based upon a reading of your request and from a conversation had with Mr. Charlie McDowell, one of your counsel, that you desire to know specifically if the adoption of the Code of 1940 had the effect of repealing Act No. 391, Local Acts of 1927, page 322.

In answer to this question, I wish to call your attention to the fact that as a rule a General Act does not repeal a Local Act unless there is a manifest intention of the Legislature expressed in the General Act that it shall have this effect. See *Shepherd et al v. Clements*, 224 Ala. 1, 141 So. 255; Quarterly Report of Attorney General, Volume XIX, page 165.

I do not find anything in the Code of 1940 which leads me to believe that it was the intention of the Legislature in adopting it that it should repeal your Local Act. On the contrary, it is my judgment that the Legislature expressly provided that such was not to be the effect. I call your attention to Section 9, Title 1 of the 1940 Code, the pertinent part of which reads as follows:

"Local, private, or special statutes, and those public laws not of general and permanent nature, and those relating to the swamp and overflowed lands, and those relating to the public debt, and appropriations, and any act submitting an amendment to the Constitution, and any act to be effective upon the adoption of such an amendment to the Constitution, are not repealed by this Code."

In addition to this, it must be remembered that repeal by implication is not favored in this jurisdiction and that the Legislature evidently had such in mind when it included in the 1940 Code the above quoted excerpt. This excerpt from the 1940 Code, in my opinion, had the effect of safeguarding Local Acts like yours from repeal by implication. See *Reid v. Wallace*, 27 Ala. App. 199, 168 So. 900; Quarterly Report of Attorney General, Volume XX, page 21; Quarterly Report of Attorney General, Volume VII, pages 196 and 203; and Quarterly Report of Attorney General, Volume V, page 45.

In view of the above authorities, it is my opinion that the adoption of the 1940 Code did not repeal Local Act No. 391, *supra*, and that your county treasurer should be guided by the provisions of the Local Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1942.

Miss Addie Lee Farish,
Superintendent of Banks,
Capitol.

Banks and Banking—Liquidation of Banks—

1. When money borrowed by Superintendent of Banks under agreement with the lender that the money is to be used for the purpose of paying stated dividends to named classes of creditors, such fund is in the nature of a trust for the benefit of the named creditors and is not subject to distribution among general creditors.

2. Where some of the beneficiaries fail to claim their pro rata share, the balance of such fund in the hands of the Superintendent is held in trust for them until a court of equity terminates the trust.

3. The lender participates as a general creditor in the distribution of the other funds of the liquidated bank.

Opinion by Assistant Attorney General Callahan.

Dear Madam:

Your request for official opinion bearing date of March 18, 1942, is as follows:

"There is attached hereto a copy of an application filed in my office by the Reconstruction Finance Corporation requesting that I, as Superintendent of Banks for the State of Alabama, approve and forward same to the State Comptroller for audit and payment. This application is identical with a number of others, except as to amount and name of bank.

"For your information, I also enclose a copy of the form of application made by the then Superintendent of Banks to the Reconstruction Finance Corporation for the purpose of obtaining a loan, the proceeds of which were to be used for the payment of a dividend to the depositors and creditors of the defunct bank, together with any preferred claims as specified in Paragraph 5 of the application. The money which the Reconstruction Finance Corporation seeks to reclaim is a part of this loan.

"The facts are that the funds advanced by the Reconstruction Finance Corporation were used in strict accordance with the terms of said application (paragraph 5 thereof) in that all claims specified to be paid in full were discharged. The funds specified to be used for the payment of dividends to the depositors and general creditors under sub-section 'A' of said paragraph 5 of said application were segregated from the other assets of the defunct bank and deposited in a special dividend account in trust for the persons entitled to participate in said dividend. They were so held in trust by the Superintendent of Banks for three years after the

liquidation of the defunct Institution, when unclaimed dividends were transmitted to the State Treasurer under authority of the Code of Alabama, Title 5, Section 74.

"I entertain serious doubt that the Reconstruction Finance Corporation has any claim to these unclaimed funds. It is my judgment that they belong to the persons entitled to participate in said dividend, and that the State Treasurer should continue to hold the same in trust for such persons.

"Your opinion is requested as to whether or not I, as Superintendent of Banks, may lawfully approve this claim, and forward same to the State Comptroller for audit and payment. Also whether or not the State Treasurer may lawfully pay this claim from monies transmitted to him, by this office, which sums represent unclaimed dividends of depositors and general creditors in the defunct bank."

I have canvassed the record in this case and the pertinent questions of law presented thereby. It affirmatively appears that the petitioner in this case chiefly rests his claim on Code 1940, Title 5, Section 75. The claimant suggests that it has a moral and equitable right to the funds in the hands of the state treasurer. To get a footing for this last claim, the petitioner assigns as a reason that its funds were advanced to the liquidating agent for a special purpose "and when that purpose was not accomplished the funds became impressed with the resulting trust in favor of the Reconstruction Finance Corporation. This resulting trust attached to the funds which were turned in to the State Treasurer by the Liquidating Agent."

It is not necessary to admit or deny the soundness of this legal assertion. The statement simply assumes that the special purpose for which the loan was made has not been accomplished. The petition fails to set forth any facts from which may be concluded that the purpose failed. It is presumed that the petitioner has reference to the application for the loan wherein it was stated that the purpose of the loan was to make advanced distribution of a named per cent to a named class of creditors of the bank that was being liquidated by the Superintendent of Banks.

It is my opinion that this loan for such specific purposes created equitable rights in the nature of a trust and constituted the named creditors of the bank the beneficiaries of the amount named to the extent of their allocated amounts. 65 C. J. 295, Section 69; 1 **Bogert on Trusts and Trustees**, Section 21; **Teal et al v. Pleasant Grove Local Union** 204 etc., 200 Ala. 23, 25, 75 So. 385; **Hardwick v. Robinson**, 1 Stew. & P. 99.

Ordinarily, the party creating the trust (here the Reconstruction Finance Corporation) has no interest in the property thereafter. 1 **Bogert on Trusts and Trustees**, Section 41. In such cases, the title passes out of the creator of the trust. When the trust is impossible of performance or fails for any cause, a court of equity, on proper application, will terminate it and have the estate distributed according to the equities of the interested parties. 65 C. J. 384, Section 128.

The right of the beneficiary owner of the cestui que trust will be protected in equity where it appears that a trust exists by reason of agreement or the circumstances of the transaction. 65 C. J. 384, Section 128; 19 Am. Juris. p. 153, Section 166; **Woodstock Iron Co. v. Fullenwider**, 87 Ala. 584, 6 So. 197; 19 Amer. Juris. p. 153, Section 167.

In the case in hand it appears that the Superintendent of Banks acquired the money from the Reconstruction Finance Corporation and used the money in strict accordance with the terms of the application and that the said money was segregated from other assets of the defunct bank and deposited in a special deposit account in trust for the parties entitled to participate in this special fund. All such parties as applied were paid and a few failed to apply, leaving a balance still held in trust for them by the Superintendent of Banks. It was the duty of the Superintendent of Banks to follow the terms of his contract with the Reconstruction Finance Corporation and pay the money out as the contract directed. **Re: Casani**, 135 A. L. R. 1513, 1515. In compliance with the law, the Superintendent deposited this balance with the State Treasurer. Code 1940, Title 5 Section 74.

It is clear enough that the Reconstruction Finance Corporation had no trust rights in the money loaned to the Superintendent of Banks because, as we have said, under the contract under which it had been loaned, the Superintendent was directed to pay it to named parties and the parties who had not called for their share could apply under the Code 1940, Title 5, Section 75, after the trust fund had been delivered to the State Treasurer. The placing of this money with the State Treasurer did not change the character of this special trust. It was still held for the named beneficiaries of that fund and no one else was entitled to it until they had been paid. It is evident that the Reconstruction Finance Corporation was and is a civil contract creditor as to the balance due it and, as such creditor, may apply under Title 5, Section 75 of the Code for its share of funds on hand after satisfaction of the special trust.

This section, when construed in the light of the law and the peculiar facts in this case, does not mean to destroy the rights of the unpaid beneficiaries of the special trust fund nor does it mean to place the lender herein in that class of creditors. The Reconstruction Finance Corporation's rights only apply to balances left after payment of the special trust. The statute does say trust funds but all funds not distributed are, in a general sense, trust funds belonging to the creditors of the bank. In the application for the loan the liability under the contract constitutes a first charge against all assets of the trust. This is a reference to all the property being held in trust for creditors. In this same section (10) of the application, it is further provided that no distribution except as herein provided shall be made to depositors or other general creditors of the bank until the loan is paid. The words "except as herein provided" refer to the provisions of the application showing that the loan is to pay certain creditors. It undoubtedly does not refer to a settlement and distribution before such creditors are paid. The money was loaned to pay these certain named parties before any final liquidation or distribution was made. The State statute governing liquidation of banks is read into the contract. It must follow that you should decline to approve the claim as to the balance unclaimed by the special creditors.

The last sentence in your letter is somewhat confusing. It reads as follows:

"Also whether or not the State Treasurer may lawfully pay this claim from monies transmitted to him, by this office, which sums represent unclaimed dividends of depositors and general creditors in the defunct bank."

The first part of your letter indicates that this borrowed money was kept separate and apart in a special fund. If it has been deposited along with the other general funds of the bank into the hands of the State Treasurer, a very complicated question might arise. The Reconstruction Finance Corporation, when considered as a general creditor, would be entitled to its pro rata share of any general fund in the hands of the State Treasurer.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 30, 1942.

Hon. Frank M. Allen,
County Superintendent of Education,
Clay County,
Ashland, Alabama.

County School Board—Power to Contract—

1. The power of the board to contract is created by law and this power must be exercised in strict accordance with the law.
2. The board cannot make a valid contract until the resolution of the board authorizing the same has been adopted by the board and spread upon its minutes.
3. The board speaks only through its records or written memorials of its actions.
4. The records of the board cannot be supplied after its contracts are made.
5. The board may be liable in an action of assumpsit for goods, materials or labor furnished on request of the board and received and accepted by it, although no resolution was passed or entered upon its minutes. Such liability is not based upon a contract but rather on principles of equity. The county board of education has authority to pay reasonable value for material or work or labor furnished in such case.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 19, 1942, is as follows:

"During the years 1939 and 1940 the Town of Ashland, Alabama, engaged in street improvement consisting of paving, sidewalks, curbing, etc.

"The County Board of Education desired that such improvement work be done to the property used for school purposes, both High School and Grammar School, and requested the town to do so with the agreement that when the work was completed the County Board of Education would pay the cost. This agreement was verbal and was never entered on the minutes of the County Board of Education. The improvement work was done, the cost has been ascertained and the County Board of Education wishes to pay not what the town has ascertained, but what they think from their own appraisal would be proper and right.

"Please advise me if such payment can be legally made and can the County Board of Education now amend its minutes to show such agreement."

The county board of education is a governmental agency created by law and is endowed with certain rights and powers that are defined by the statute, and, being a creature of the statute, it can exercise only those powers which are expressly conferred upon it or necessarily incident thereto. It must exercise this statutory power in strict accordance with the statute. *County Board of Education v. Slaughter*, 230 Ala. 229, 160 So. 758.

The statute has conferred power upon the county board of education to make contracts such as are referred to in your letter but it specifically provides that the contract cannot be made until there has been a resolution adopted by the board and spread upon its minutes. Code 1940, Title 52, Section 99. Under this statute it is manifest that a contract made before such resolution is adopted by the board is unwarranted and unenforceable as a contract. To make such a contract and then adopt a resolution therefor is in open violation of the statute. *Greeson Mfg. Co. v. County Board of Education*, 217 Ala. 565, 117 So. 163.

The county board of education speaks only through its records or written memorials of its actions. *Board of Education, Marshall County v. Baugh*, 240 Ala. 391, 199 So. 822.

While no recovery can be had against the county board of education on this contract, yet a recovery may be had against it in an action of assumpsit for goods, materials, etc. furnished at the request of the board and accepted and used by it, although there was no resolution authorizing a contract. The right of recovery in such a case rests upon equitable principles. *Greeson Mfg. Co. v. County Board of Education*, 217 Ala. 565, 117 So. 163.

In view of the case last cited, the board is liable for the improvements made at the request of the board, and, this being true, it is my opinion that the board is authorized under the law to pay a reasonable sum for the work and improvements made. Cf. Quarterly Report of the Attorney General Volume XIV, page 20.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

INDEX

"A"

Page

ABSENTEE BALLOTS:

Elector absent during hours poll open by reason of his regular duties	150
Primaries—time for application	142
Primary elections—one box only	141

ACTS (General and Local):

LOCAL ACTS 1927:

Page 322	156
----------	-----

LOCAL ACTS 1931:

Page 167	29
----------	----

LOCAL ACTS 1935:

Page 24	129
---------	-----

LOCAL ACTS 1939:

Page 122	125
Page 143	51

GENERAL ACTS 1932:

Pages 56, 94, 112	5
-------------------	---

GENERAL ACTS 1939:

Page 113	100
Page 424	100
Page 967	90
Page 1000	55

ALABAMA BEVERAGE CONTROL ACT:

Nuisances—statement of—costs where payable from	109
Elections—petition call for, when filed	86

ALABAMA RELOCATION CORPORATION:

Filing tax—not exempt	37
-----------------------	----

INDEX—Continued

Page

ALABAMA STATE HOSPITALS:

Mount Vernon (Searcy) Hospital—lands may not be conveyed by Trustees of State Hospitals	93
--	----

ALABAMA STATE (HOME) GUARD:

Poll tax, not exempt	35
----------------------------	----

APPEALS:

Criminal case—costs of transcript on appeal to Court of Appeals and Supreme Court	115
--	-----

ATTORNEY:

License—half year	57
-------------------------	----

"B"

BAILIFFS:

Mobile County—appointment	100
---------------------------------	-----

BANKS AND BANKING:

Liquidation—right to unclaimed shares—superintendent of banks	158
Reconstruction Finance Corporation—trust fund—borrowed money— right to unclaimed shares	158

BARBOUR COUNTY:

Local Acts 1927 p. 322 relative to Board of Revenue and Treasurer not repealed by Code 1940	156
--	-----

BONDS:

School—National Defense—use of proceeds from school bonds	139
---	-----

BOARDS OF REVENUE:

See COURTS OF COUNTY COMMISSIONERS

"C"

CALHOUN COUNTY:

Elections—clerical help to prepare list of qualified voters	125
---	-----

CERTIFICATES:

Convenience and necessity issued under grandfather clause, transfer of	82
---	----

INDEX—Continued

Page

CHEROKEE COUNTY:

Road Supervisor—vacancy to be filled by Governor	51
--	----

CLERKS OF CIRCUIT COURTS:

Commission on monies remitted fine and forfeiture fund	129
Fee—forfeiture case	123
Costs of appeal to Court of Appeals and Supreme Court	115
Summons—branch—fee for issuing to each defendant	45
Witnesses—acceptance of fine and cost before expiration of 5 days	24

CLERKS OF COUNTY COURTS:

Alias warrant of arrest—no authority to issue	27
---	----

COAL DEALERS:

Licenses—grocery store selling small quantities of coal	38
---	----

CODES:

Adoption—omission of act legalizing near beer	5
---	---

CODE 1940:

TITLE 1:

Section 9	156
Section 12	153
Section 12	9

TITLE 2, Section 526	80
----------------------------	----

TITLE 5:

Section 75	158
Section 250	68

TITLE 10:

Section 37	19
Section 150	37

TITLE 11:

Section 29	55
Section 85	123
Section 87	134

INDEX—Continued

	Page
TITLE 12:	
Section 7	97
Section 30	156
Section 110	134
Section 118	134
TITLE 13:	
Section 186, 187	100
Section 198 (16)	129
Section 340	27
TITLE 17:	
Section 9	141
Section 38 and 40	146
Section 55	125
Section 60	142
Section 131	150
Section 172	150
Section 417	150
Section 418	141
Section 420	142
TITLE 22, Section 92	113
TITLE 26, Section 54	90
TITLE 29:	
Section 68	86
Section 152	109
TITLE 35, Section 11	35
TITLE 41, Section 162	7
TITLE 42, Section 24	48
TITLE 45, Section 190	93
TITLE 48:	
Section 301 (2) (F)	59
Section 301 (34)	59
Section 301 (8) and 301 (30)	82

INDEX—Continued

	Page
TITLE 51:	
Section 20	97
Section 243	9
Section 267	66
Section 346	67
Section 460	57
Sections 488 and 489	33
Section 618	37
Sections 618 and 619	72
Section 704	42
Section 704	133
Sections 718, 719 and 729	11
Section 835	78
Section 848	42
Section 850	57
Section 886	95
TITLE 52:	
Section 99	161
Section 216	139
Section 388	73
TITLE 55, Section 103	93
TITLE 61, Section 48	22
TITLE 62, Section 138	55
CODE 1923:	
Section 6972	19
CONDEMNATION:	
United States—taxation—decree entered prior to October 1	31
CONSTITUTION OF 1901:	
Amendment No. 8	15
Section 229	63
CONTRACTS:	
Warehouses—liability for loss affected by war, riot, etc.	80
Schools—invalid—right to pay reasonable sum	161
CORPORATIONS:	
Increase capital stock—fee of probate judge	19

INDEX—Continued

	Page
CORRECTIONS AND INSTITUTIONS, DEPT. OF:	
Costs of transcript on appeal	115
COSTS AND FEES:	
Clerk—branch summonses	45
Corporations—increasing capital stock	19
Criminal case—appeal to Court of Appeals and Supreme Court	115
Forfeiture cases—clerk, sheriff and solicitors	123
Jefferson County—Probate Court—when Circuit Court fees allowable	55
Joint prosecution—severance—plea of guilty by one	26
Liquor nuisance—abatement	109
Marriage—licenses, celebrating rites and reporting to Board of Health	113
Probate Judge—no fee for recording order of circuit judge transferring case to equity	22
Sheriffs—attendance on county court—claim barred—equitable claim	134
Sheriff—Guard fee—where person makes bond	127
Sheriff—summons returned “not found”	45
Trial tax—where court does not have jurisdiction	96
COUNTIES:	
Appropriate for erection of school building—temporary loan	73
Payment of equitable claim barred by statute of limitations	134
Postage—may establish control mailing office	47
Telephone for county agent	121
Temporary loan—erection of school building	73
COUNTY AGENT:	
Telephone furnished by county	121
COUNTY BOARD OF EDUCATION:	
Invalid contract—right to pay reasonable sum for work done	161
School bonds—use of proceeds—national defense bonds	139
COUNTY COURTS:	
Alias warrant—who issues	27
Witnesses—who summons for state	27
COUNTY DEMOCRATIC EXECUTIVE COMMITTEE:	
Member may be on Court of County Commissioners	97
COURTS OF COUNTY COMMISSIONERS:	
Barbour County—Local Acts 1927, p. 322,—not repealed by Code 1940	156
Member may be a County Democratic Executive Committee also	97
Office voluntarily abandoned—must be reappointed	7
Office—ousted on conviction, reinstated on reversal	7

INDEX—Continued

	Page
COURT OF RECORD:	
Limestone County, Municipal Court	29
"D"	
DEBTS:	
Counties—after constitutional limit reached	73
"E"	
ELECTIONS:	
Absentee ballots—elector absent only during hours polls open	150
Absentee ballots—time for applications	142
Alabama Beverage Control Act—when petition filed with probate judge	86
List of qualified electors—clerical help to prepare	125
Poll lists—primaries—probate judge furnish only one list—duty to strike name from	146
Primary—absentee ballots—one box only	141
Time—Daylight Saving (War) Time	153
ELMORE COUNTY:	
Inferior Court—transfer of witness fees—commission of clerk— continuance fee—trial fee	129
EMINENT DOMAIN:	
United States—taxation—decree of condemnation entered prior to October 1	31
ESCAPES:	
Tax sale, invalid—assessment as escape	66
EXCISE TAXES:	
Counties—not exempt from state tobacco and federal match tax	11
EXEMPTIONS:	
Mileage tax—carrier transporting newspapers and magazines	59
"F"	
FEDERAL REVENUE ACT OF 1941:	
Section 3540	54

INDEX—Continued

	Page
FEDERAL SAVINGS AND LOAN:	
Franchise tax—permit fee	68
FEDERAL USE TAX:	
Automobile owned by state or political subdivision.....	54
FILING TAX:	
Alabama Relocation Corporation—not exempt	37
Deed and mortgage back from grantee	7½
FINE AND FORFEITURE FUND:	
Cost of mailing transcript on appeal	11½
Liquor nuisance—abatement of costs	109
FRANCHISE TAX:	
Federal Savings and Loan	6½
“G”	
GASOLINE EXCISE TAX:	
Exemptions—gas sold to United States	117
GOVERNOR:	
Contingent Fund—costs in abating liquor nuisance.....	103
GROSS RECEIPTS:	
Railroads—records of interstate and intrastate business.....	95
“I”	
INCOME TAX:	
Non-resident receiving income from contract of cost-plus-a-fixed-fee with U. S.	131
INDUSTRIAL RELATIONS, DEPT. OF:	
Board of Mine Examiners—expenses of.....	90
INFERIOR COURTS:	
Elmore County—witness fees, clerk, continuance fee, trial fee.....	123
Limestone County, Municipal Court	28

INDEX—Continued

Page

INTOXICATING LIQUORS:

Near Beer—act authorizing repealed by omission from Code	5
--	---

"J"

JEFFERSON COUNTY:

Library tax—not applicable to probate court	55
---	----

JUDGE OF PROBATE:

Corporations—fee on report of increase of capital stock	19
Fee—marriage license; celebrating rites; reporting to Board of Health	113
Fee—Decree on final settlement when more than one distributee	55
Jefferson County—when circuit court fees allowable	55
Licenses—refund—motor vehicle—where purchased in wrong county	42
Poll list—primaries—number of—duty to strike names from	146
Records—no authority to record order of circuit judge transferring case to equity	22
Conclusiveness as to parties of the same class	106

"L"

LIBRARY TAX:

Jefferson County—probate court	55
--------------------------------------	----

LICENSES:

Attorneys—half year	57
Citation—wrong name	78
Coal dealers—grocery store selling small quantities	38
Motor vehicles—owned by corporation, proper county	133
Motor vehicle—refund—where purchased in wrong county	42
Plate glass	41

LICENSE INSPECTORS:

Citation in wrong name	78
------------------------------	----

LIMESTONE COUNTY:

Municipal Court—authority to acknowledge deeds, mortgages, perform marriages, etc.	29
Municipal Court—court of record	29

LIMITATIONS, STATUTE OF:

Counties—may pay equitable claims though barred	134
---	-----

INDEX—Continued

Page

"M"

MARRIAGE:

Fee—License; celebrating rites; reporting to Board of Health	113
--	-----

MILEAGE TAX:

Motor carrier—transporting newspapers and magazines	59
---	----

MILITIA:

Poll tax—state guard not exempt	35
---------------------------------------	----

MINE EXAMINERS, BOARD OF:

Expenses	90
----------------	----

MOBILE COUNTY:

Bailiffs—appointment	100
Tax Collector—protected by judgment of circuit court	106

MOTOR CARRIERS:

Mileage tax—transporting newspapers and magazines	59
Transfer of certificate of convenience and necessity—grandfather clause—fee	82

MOTOR VEHICLES:

Federal use tax—owned by state or political subdivision, exempt	54
License plates—corporations—purchase in county vehicle is principally used and operated	133
Licenses—refund—where purchased in wrong county	42

MUNICIPAL CORPORATIONS:

Municipal purpose—repairing local school is such	15
Special tax—schools—may appropriate surplus for any municipal purpose	15

"O"

OFFICERS AND OFFICES:

Appointment—Cherokee County—Road Supervisor—at will of Governor	51
County Commissioners—Vacated by conviction, restored by reversal and lapse of time for further appeal	7
County Democratic Executive Committee—member does not hold "office"	97
Judgment of circuit court—protection as to persons in same class	106
Postage—county may establish central mailing room	47
Voluntary abandonment, must be reappointed	7

INDEX—Continued

Page

OFFICE SUPPLIES:

County may establish central mailing room.....	47
--	----

OPINIONS OVERRULED, MODIFIED OR DISTINGUISHED:

Quarterly Report Volume VIII, p. 254	27
Quarterly Report Volume IX, p. 50	24
Quarterly Report Volume XXIX, p. 117	153
Quarterly Report Volume XXIX, p. 129	109
Quarterly Report Volume XXIII, p. 119	134
Quarterly Report Volume XXIV, p. 86	24

"P"

PERMIT FEE:

Federal Savings and Loan	68
--------------------------------	----

POLL TAX:

State (Home) Guard, not exempt	35
When Feb. 1 falls on Sunday	9

POSTAGE:

County may establish central mailing room	47
---	----

PRIMARIES:

See ELECTIONS.

PROBATION:

Revocation—fugitive not entitled to credit on sentence	48
Revocation proceedings—probationer must be present	48

PROBATE JUDGE:

See Judge of Probate.

PUBLIC SERVICE COMMISSION:

Certificate of convenience and necessity—grandfather clause—fee	82
---	----

"R"

RAILROADS:

Gross receipts tax—record on interstate and intrastate business	95
---	----

INDEX—Continued

Page

RECONSTRUCTION FINANCE CORPORATION:

Defunct bank—trust fund—beneficiaries—right to unclaimed shares 158

RECORDS:

No authority to record order transferring case from probate to equity court 22

REFUNDS:

Licenses—motor vehicle—where purchased in wrong county 42

ROADS AND BRIDGES:

Cherokee County—Supervision—vacancy filled by Governor 51

"S"

SCHOOLS:

Bonds issued to erect school building—use of proceeds if building cannot be erected 139

County Board of Education—invalid contract—right to pay reasonable sum 161

Special Municipal Tax—surplus may be used for any municipal purpose 15

Temporary loan for erection of building 73

SEARCY (MOUNT VERNON) HOSPITAL:

Lands may not be conveyed by trustees of Alabama State Hospitals 93

SEVERANCE:

Plea of guilty by one 27

SHERIFFS:

Fee—attendance on county court—claim barred—equitable claim 134

Fee—forfeiture case 123

Guard fee—where bond is made 127

Probation of will—sheriff's fee for serving notice on next of kin 22

Summons returned "not found" 45

SOLICITORS:

Commissions—forfeiture case 123

SUMMONS:

Branch—fee for issuing to each defendant 45

Sheriff—return "not found" 45

"T"

TAX SALES:

Invalid—assessment as escape 66

Invalid under facts stated 66

TAXATION:

Counties—liable for state tax on tobacco and Federal tax on matches 11

Gasoline Excise tax—gasoline sold to U. S. 117

Gross receipts—railroads—records of interstate and intrastate business 95

Motor vehicles—licenses—proper county when owned by corporation 133

United States—Condemnation—decree entered prior to October 1 31

United States—property held under executor control on October 1 31

INDEX—Continued

	Page
TELEPHONE:	
County agent—furnished by county	121
TIME:	
Elections—Daylight Savings (War) Time	153
TOBACCO TAX:	
Counties not exempt from	11
TRIAL TAX:	
Case where court does not have jurisdiction	96
“T”	
UNITED STATES:	
Income tax—individual receiving income from cost-plus contract with	137
Taxation—property held on October 1 under executory contract	31
U. S. C. A.:	
Title 12, Section 1464 (h)	68
Title 26, Section 3540	54
USE TAX, FEDERAL:	
Automobile owned by state or political subdivision	54
“W”	
WAREHOUSES:	
Liability for loss by war, riot, etc.	80
WARRANTS:	
Alias, clerk may not issue	27
Alias—issued only by judge	27
School building—use of proceeds if building cannot be erected	139
WILLS:	
Probation—sheriff's fee for serving notice on next of kin	22
WITNESSES:	
Clerks of Circuit Courts—accepting fine and costs before expiration of 5 days	24
County Court—who summons for state	27
WORDS AND PHRASES:	
“Business”	137
“Business”	57
“Contiguous”	59
“Court of Record”	29
“Day”	142
“Filed with”	86
“Office”	96
“Principal business”	41
“Reversed”	7
“Standard Railroad Central Time”	153